No. 99-1408-CFX Title: Gail Atwater, et al., Petitioners
v.
City of Lago Vista, et al.

Docketed: February 23, 2000 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Feb 22 2000	Petition for writ of certiorari filed. (Response due March 24, 2000)
	Mar 21 2000	Motion of American Civil Liberties Union of Texas, Inc., for leave to file a brief as amicus curiae filed.
	Mar 21 2000	Motion of Texas Criminal Defense Lawyers Association for leave to file a brief as amicus curiae filed.
	Mar 24 2000	Motion of National Association of Criminal Defense Lawyers, et al., for leave to file a brief as amici curiae filed.
	Apr 5 2000	DISTRIBUTED for Conference of April 21, 2000
	Apr 18 2000	Response requested.
	May 18 2000	Brief of respondents City of Lago Vista, et al. in opposition filed.
	May 30 2000	REDISTRIBUTED for Conference of June 15, 2000
	Jun 19 2000	REDISTRIBUTED for Conference of June 22, 2000
	Jun 26 2000	Motion of American Civil Liberties Union of Texas, Inc., for leave to file a brief as amicus curiae GRANTED.
	Jun 26 2000	Motion of Texas Criminal Defense Lawyers Association for leave to file a brief as amicus curiae GRANTED.
	Jun 26 2000	Motion of National Association of Criminal Defense Lawyers, et al., for leave to file a brief as amici curiae GRANTED.
	Jun 26 2000	Petition GRANTED. SET FOR ARGUMENT December 4, 2000. **********
	Jul 7 2000	Order extending time to file petitioners' brief on the merits to and including September 11, 2000.
	Jul 7 2000	Order extending time to file respondents' brief on the merits to and including November 1, 2000.
	Sep 5 2000	Record filed.
	Sep 6 2000	Brief amicus curiae of Americans for Effective Law Enforcement, Inc. filed.
	Sep 8 2000	Brief amicus curiae of Texas Criminal Defense Lawyers Association filed.
	Sep 11 2000	Joint appendix filed.
	Sep 11 2000	Brief of petitioners Gail Atwater, et al. filed.
	Sep 11 2000	Brief amici curiae of Institute on Criminal Justice at Univ. of Minnesota, et al. filed.
	Sep 11 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Sep 11 2000	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Sep 11 2000	Brief amicus curiae of Cato Institute filed.
	Sep 12 2000	Record filed.
	Sep 12 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the

No. 99-1408-CFX

Entry	Date	Proceedings and Orders
		petitioners and counsel for the respondents.
	Oct 24 2000	CIRCULATED.
	Oct 26 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
	Nov 1 2000	Brief of respondents City of Lago Vista, et al. filed.
	Nov 1 2000	Brief amicus curiae of Texas Police Chiefs Association filed.
	Nov 1 2000	Brief amici curiae of National League of Cities, et al. filed.
	Nov 1 2000	Brief amicus curiae of United States filed.
	Nov 1 2000	Brief amici curiae of Texas, et al. filed.
	Nov 9 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument DISTRIBUTED.
	Nov 13 2000	Motion of Texas, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED.
	Nov 21 2000	LODGING consisting of twenty velo bound copies of Texas Dept. of Public Safety documents submitted by counsel for amici, Texas, et al.and distributed.
	Nov 24 2000	Reply brief of petitioners Gail Atwater, et al. filed.
	Dec 4 2000	ARGUED.

Supreme Court, U.S.
FILED
FEB 22 2000
OFFICE OF THE CLERK

No. 991408

IN THE
SUPREME COURT OF THE UNITED STATES

Gail Atwater, and Michael Haas as next friend of Anya Savannah Haas and Mackinley Xavier Haas,
Petitioners,

v.

City of Lago Vista, Bart Turek, and Frank Miller,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Gail Atwater was placed under custodial arrest for not wearing a seat belt, a misdemeanor that carries a fifty-dollar fine as its maximum penalty. Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

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The decision of the Fifth Circuit Court of Appeals, sitting *en banc*, is reported at *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (en banc), and is reproduced in Appendix A to this Petition.

The decision of the three-judge panel of the Fifth Circuit Court of Appeals is reported at *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999), and is reproduced in Appendix B to this Petition.

The Order of the United States Court for the Western District of Texas, Austin Division, was not published, but is reproduced in Appendix C to this Petition.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on November 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Texas Transportation Code Ann. § 545.413, provides, in relevant part:

(a) A person commits an offense if the person:

(1) is at least 15 years of age;

(2) is riding in the front seat of a passenger car while the vehicle is being operated;

(3) is occupying a seat that is equipped with a safety belt; and

(4) is not secured by a safety belt.

(b) A person commits an offense if the person:

(1) operates a passenger car that is equipped with safety belts; and

(2) allows a child who is at least four years of age but younger than 15 years of age to ride in the front seat of the vehicle without requiring the child to be secured by a safety belt.

(c) A passenger car or a seat in a passenger car is considered to be equipped with a safety belt if the vehicle is required under Section 547.601 to be equipped with safety belts.

(d) An offense under this section is a misdemeanor punishable by a fine of not less than $25 or more than $50.

Tex. Transp. Code Ann. § 545.413 (West 1999) (subsequently amended effective Sept. 1, 1999).

STATEMENT OF THE CASE

This case presents the question of whether the Fourth Amendment limits the use of a full custodial arrest for a fine-only misdemeanor. The Court appeared ready to resolve the issue in 1998 when it granted certiorari on essentially the same question. *See Ricci v. Village of Arlington Heights*, 522 U.S. 1038 (1998) (No. 97-501) (granting cert. to 116 F.3d 288 (7th Cir. 1997)). Unfortunately, the Court subsequently dismissed certiorari after it became apparent during oral argument that the facts of the case did not actually raise the question presented. *See Ricci v. Village of Arlington Heights*, 523 U.S. 613 (1998) (dismissing cert. as improvidently granted). This case presents the Fourth Amendment issue that *Ricci* did not.

I. The Facts.

The facts of this case are straight-forward. Following a traffic stop, a Lago Vista police officer placed Petitioner Gail Atwater under full custodial arrest for violating a Texas statute that requires use of seat belts.

On March 26, 1997, Gail Atwater was driving her two children home from soccer practice. She was driving the family's pickup truck at approximately fifteen miles per hour on a residential street near her home. Her four-year-old son was seated in the middle of the front seat and her six-year-old daughter was seated on the passenger side. None were wearing seat belts.

Bart Turek, a Lago Vista police officer, observed the violation and stopped Ms. Atwater. While Ms. Atwater and her children remained in the truck, Officer Turek approached and screamed that they had met before or that they had had this conversation before. This frightened the children, who began to cry, so Ms. Atwater calmly and quietly requested that Officer Turek lower his voice. He responded by telling her that she was going to jail.

Without provocation, Officer Turek continued to speak to Ms. Atwater in a verbally abusive manner, accusing her of not caring for her children. Officer Turek claimed he had recently stopped Ms. Atwater for not having her children in seat belts, but this was false. He had stopped her several months before while with her son, but the boy's seat belt had been securely fastened. No citation had been issued, and Officer Turek had not told Ms. Atwater his basis for stopping her.

Police officers in Texas, as in other states, may issue tickets after stopping motorists for traffic violations. Tex. Transp. Code Ann. §§ 543.003-.005 (West 1999). Rather than doing this, Officer Turek placed Ms. Atwater under full custodial arrest.[1] He handcuffed her with her hands behind

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[1] Officer Turek later claimed that he had also arrested Ms. Atwater for not carrying a driver's license and proof of insurance. (She had neither with her because her purse recently had been stolen.) Officer Turek's claim is inconsistent with his pronouncement, before requesting her license or insurance, that he was taking her to jail. It is also disingenuous because Ms. Atwater provided him with her driver's license number, and Officer Turek had seen both her license and proof of insurance during the previous stop. Be that as it may, even if Officer Turek's after-the-fact justification is accepted, the penalties for these

her back, loaded her into his squad car, and took her to the police station. At the police station, she was forced to remove her shoes, jewelry and glasses, and empty her pockets. Ms. Atwater's "mug shot" was taken, and she was placed in a jail cell for approximately one hour until being taken before a magistrate.

Gail Atwater pled no contest to the seat belt offense and paid the maximum penalty for this violation — a fifty-dollar fine. The charges of driving without a license and proof of insurance were dismissed.

II. The Proceedings Below.

Petitioners Gail Atwater and her husband Michael Haas, as next friend for their children, filed suit in state court against the City of Lago Vista, Police Officer Bart Turek, and Chief of Police Frank Miller (collectively "the City" or "respondents") for damages suffered by petitioners arising from Ms. Atwater's incarceration.

The City removed the suit to the United States District Court for the Western District of Texas, which granted summary judgment for the City. The district court ruled that petitioners had not identified a constitutional right that had been violated by the custodial arrest.

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offenses are also minor fines. *See* Tex. Transp. Code Ann. §§ 521.025(c), 601.191(b) (West 1999). Furthermore, it is a defense to prosecution if the person charged thereafter produces a valid license and proof of insurance (as Officer Turek well knew that Ms. Atwater would be able to do). *See* Tex. Transp. Code Ann. §§ 521.025(d), 601.193 (West 1999). Officer Turek's contention has no bearing on the Fourth Amendment issue.

A three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the summary judgment with respect to the Fourth Amendment claim, holding petitioners had established that the custodial arrest for not wearing a seat belt violated a clearly established Fourth Amendment right. The remainder of the district court's judgment was affirmed.

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. After oral argument, a majority affirmed the district court's judgment in all respects, holding that the custodial arrest did not violate Ms. Atwater's Fourth Amendment rights. Six judges dissented.

REASONS FOR GRANTING CERTIORARI

Twenty-six years ago, Justice Potter Stewart observed in *Gustafson v. Florida* that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made." *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). The motorist had conceded the constitutionality of his arrest, and instead challenged only the search that followed.

Just over two years ago, this Court granted certiorari to consider whether an individual could be arrested without a warrant for a non-breach-of-the-peace misdemeanor. *Ricci v. Village of Arlington Heights*, 522 U.S. 1038 (1998) (No. 97-501) (granting cert. to 116 F.3d 288 (7th Cir. 1997)). However, after full briefing on the merits and oral argument, the Court learned the arrest was for the violation of a civil ordinance, not a misdemeanor, and certiorari was dismissed

as improvidently granted. *Ricci v. Village of Arlington Heights*, 523 U.S. 613 (1998) (dismissing cert. as improvidently granted).

Today, the instant case squarely presents the Fourth Amendment issue in the factual setting in which it most frequently arises: the ordinary traffic stop. Like Ms. Atwater, approximately 185 million Americans as of 1998 were licensed drivers.[2] At some point in their driving careers, virtually every one of them will violate *some* traffic law, making the impact of the question presented extremely wide-ranging. The facts of this case perfectly frame the issue for the Court's consideration.

I. Whether the Fourth Amendment Places Any Restrictions on Using Custodial Arrests for Fine-Only Traffic Offenses Is an Important Issue of Federal Law.

Recognition of the importance of the question presented here is widespread, and was most notably shown by the Court's decision to grant certiorari in *Ricci v. Village of Arlington Heights*. The importance has been heightened by divergent results reached by lower courts and the incorrect result reached by the court below.

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[2] Office of Highway Policy Information, Federal Highway Administration, Highway Statistics 1998, Table DL-1C: Licensed Drivers by Sex and Ratio to Population - 1998, http://www.fhwa.dot.gov/ohim/hs98/tables/dl1c.pdf.

A. The Importance of this Issue Has Been Widely Recognized—Including by this Court.

There is widespread recognition that the question presented here is an important issue of national law. Disparate entities and groups have made this clear: this Court in *Ricci* and individual members of the Court in other cases; the Fifth Circuit; respondents in this case; numerous public interest groups; and respected legal commentators. Finally, the issue is particularly important to the average American citizen.

The issue's importance is most apparent from the Court's granting of certiorari on essentially the same issue just two years ago. The Court granted certiorari to consider what limits the Fourth Amendment places on custodial arrests for non-breach-of-the-peace misdemeanors. *Ricci v. Village of Arlington Heights*, 522 U.S. 1038 (1998) (No. 97-501) (granting cert. to 116 F.3d 288 (7th Cir. 1997)). The question remains unanswered, however, because after full briefing on the merits and oral argument, the Court dismissed certiorari as improvidently granted. 523 U.S. 613 (1998).[3]

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[3] In *Ricci*, the petitioner, who had been arrested at his place of business for operating without a business license, argued unsuccessfully to the Seventh Circuit that "the common law allowed arrest for a misdemeanor committed in an officer's presence only if that crime constituted a breach of the peace." *Ricci v. Village of Arlington Heights*, 116 F.3d 288, 289, 291 (7th Cir. 1997), *cert. granted*, 522 U.S. 1038, *cert. dism'd*, 523 U.S. 613 (1998). The Court granted certiorari to consider the issue, but unfortunately, the question presented had no relation to Ricci's case: the offense for which he had been arrested was not a misdemeanor, but a non-criminal civil infraction. *See* Transcript of Oral Argument, *Ricci v. Village of Arlington Heights*, No. 97-501, at 14, 33, 35-37, 59-

Individual members of this Court also have recognized the importance of the question presented in other cases. *See, e.g., Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting); *cf. Maryland v. Macon*, 472 U.S. 463, 471 (1985) ("We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials."). Furthermore, just a few months after the dismissal of certiorari in *Ricci*, the issue re-emerged during the oral argument for *Knowles v. Iowa*, 525 U.S. 113 (1998), when one Justice asked: "I hadn't realized that you had raised the question that Justice Stewart left over in the *Gustafson* case, which was whether you could have constitutionally a full arrest for a traffic violation." Transcript of Oral Argument, *Knowles v. Iowa*, No. 97-7597, at 5, 1998 WL 781827 (Nov. 3, 1998). (The petitioner in *Knowles* conceded he had not raised this issue.)

Recognition of the issue's importance extends beyond this Court. The Fifth Circuit recognized its importance when it granted rehearing *en banc* in this case, which it does only for issues "of exceptional public importance." Fifth Cir. I.O.P. foll. Local Rule 35.6. Respondents themselves have represented that the case presented "questions of exceptional importance" when they sought the *en banc* rehearing. Appellees' Suggestion for Rehearing *En Banc* at iii, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999); *see also* Fed. R. App. P. 35(b)(1)(B).

63, 1998 WL 204590 (April 21, 1998). Certiorari was dismissed as improvidently granted. 523 U.S. 613 (1998).

Moreover, numerous public interest groups have been moved to weigh in on the issue. When the subject was before the Court in *Ricci*, eleven non-parties (including the federal government) filed *amicus* briefs. In addition to the Solicitor General's brief, *amicus* briefs were filed on behalf of the American Civil Liberties Union, the ACLU of Illinois, the National Association of Criminal Defense Lawyers, the Institute for Justice, the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, the National Association of Counties, the International Municipal Lawyers' Association, and the International City/County Management Association.

The importance of the issue also has moved legal commentators to write on the topic, the most prominent of whom urged the Court to address the issue and explained its importance:

> It may be that on a future occasion the Court will conclude that there are some constitutional limits upon the use of "custodial arrests" as the means for invoking the criminal process when relatively minor offenses are involved. Such a holding would be most desirable, as it would address specifically a current problem of considerable seriousness: the arbitrariness and inequality which attends unprincipled utilization of the "custodial arrest" and citation alternatives. Moreover, it would substantially diminish the opportunities for pretext arrests, and thus would make the *Robinson-Gustafson* "standardized procedures" approach to searches of the person incident to arrest much more palatable.

3 Wayne R. LaFave, *Search and Seizure* § 5.2(g), at 94 (3d ed. 1996) (footnote omitted). *See also* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771 (1993); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221 (1993).

Finally, the question presented is extremely important to the average American. Virtually all of the approximately 185 million licensed drivers in this country will violate at least one traffic law over the course of their driving careers. Yet a custodial arrest is one of the most extreme governmental intrusions imaginable from the perspective of the average citizen. Whether the Fourth Amendment places any limitations on the use of custodial arrests for a fine-only traffic offense potentially impacts every driver in this country.

B. The Issue is Particularly Important Because of the Need to Resolve Confusion Among Lower Courts and to Correct the Error of the Fifth Circuit Court of Appeals.

As long as this important Fourth Amendment issue remains unanswered by this Court, lower courts will struggle and outcomes will differ. Without guidance, lower courts have taken varied approaches, with that of the Fifth Circuit being the most wrought with error.

1. When confronted with the issue, lower courts have reached varied results.

As Justice Stevens noted in *Robbins v. California*, "the Court has not directly considered the question whether 'there are some constitutional limits upon the use of "custodial

arrests" as the means for invoking the criminal process when relatively minor offenses are involved.'" *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting) (quoting 2 Wayne R. LaFave, *Search and Seizure* § 5.2, at 290 (1st ed. 1978)). The result has been a myriad of approaches on the part of lower courts.

One approach has been simply to assume, without any analysis, that the rule announced in *United States v. Watson*, 423 U.S. 411, 414-24 (1976), which permits warrantless arrests for felonies as long as there is probable cause, likewise applies to warrantless arrests for even the least serious misdemeanor. *Higbee v. City of San Diego*, 911 F.2d 377, 379 (9th Cir. 1990) ("A police officer is permitted to arrest without a warrant if a misdemeanor *or a felony* is committed in the officer's presence.") (citing *Watson*) (emphasis added); *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982) (choosing to "assume" that probable cause is the only issue until hearing from the Supreme Court that reasonableness is part of the inquiry). The *en banc* majority of the Fifth Circuit made this assumption. *See* App. A at 4a, 195 F.3d at 244. Likewise, respondents' arguments have been based on this assumption. *See, e.g.*, Brief of Appellees at 12, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

Other lower courts have avoided the constitutional issue and found custodial arrests improper for minor offenses based on state-law grounds. *See, e.g., United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993) (refusing to "sanction an otherwise unconstitutional search on the basis of an arrest which is illegal as a matter of state law"); *Barnett v. United States*, 525 A.2d 197, 199-200 & n.6 (D.C. App. 1987) (arrests not permitted for civil infractions with only a monetary sanction). At times, there is an indication that the

court regarded the custodial arrest as unconstitutional as well, but these decisions seem tied to the facts of the case and to the determination that the arrest was invalid under state law. *See, e.g., Barnett*, 525 A.2d at 199 ("[I]t was not reasonable, within the strictures of the Fourth Amendment, for [the police officer] to effect a full custodial arrest accompanied by a body search.").

At least one state high court reached the opposite result from the decision below purely as a matter of public policy, where even state law did not compel the result. *State v. Hehman*, 578 P.2d 527, 528-29 (Wash. 1978). In doing so, the Supreme Court of Washington noted Justice Stewart's concurring opinion in *Gustafson*. *Hehman*, 578 P.2d at 529. *See also Thomas v. State*, 614 So.2d 468 (Fla. 1993) (Fourth Amendment violated by a full custodial arrest rather than the issuance of a citation for the violation of a noncriminal civil ordinance). Without guidance from this Court, outcomes and analyses will continue to vary widely depending on the jurisdiction in which the traffic stop occurs.

2. The Fifth Circuit *en banc* reached the wrong decision.

The three-judge panel decision of the Fifth Circuit recognized that this Court's Fourth Amendment jurisprudence compels the conclusion that placing Ms. Atwater under custodial arrest under the circumstances of this case violated her Fourth Amendment rights. The Fifth Circuit *en banc* majority reached the opposite conclusion because it erred in three ways. First, the majority did not balance the City's interest in enforcing the seat belt law against the extent of the governmental intrusion to test the reasonableness of using a full custodial arrest, a misapplication of *Whren v. United States*, 517 U.S. 806 (1996). Second, the majority refused to

include the common law as part of its Fourth Amendment analysis, ignoring the mandate that it do so in *Wyoming v. Houghton*, 526 U.S. 295, ___, 119 S. Ct. 1297, 1300 (1999). Third, the majority effectively eviscerated the holding of this Court in *Knowles v. Iowa*, 525 U.S. 113 (1998).

a. *Whren v. United States* did not exempt custodial arrests from the Fourth Amendment's reasonableness requirement.

It is beyond dispute "that the warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable." *Payton v. New York*, 445 U.S. 573, 585 (1980). Further, all seizures must be made in a reasonable manner, despite the existence of probable cause. *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). As the Court has explained, "[t]o determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

Any balancing of the competing interests of law enforcement and individual autonomy establishes the unreasonableness of Ms. Atwater's custodial arrest. The government's side of the scale is basically empty. The small fine indicates a relatively slight governmental interest in the seat belt law's enforcement. *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984). Further, absolutely none of the many factors that can make a custodial arrest appropriate to accomplish a legitimate law enforcement objective were present in this case. *See* App. A at 17a-18a, 195 F.3d at 250 (Weiner, J., dissenting). In contrast to the lack of interests on the government's side of the scale, Ms. Atwater faced a

significant deprivation of her freedom in the form of a full custodial arrest.

The Fifth Circuit avoided applying this test – which necessarily results in a conclusion that Ms. Atwater's Fourth Amendment rights were violated – by assuming that *Whren v. United States*, 517 U.S. 806 (1996), somehow made it unnecessary to apply any balancing test. But the validity of a custodial arrest was not considered in *Whren*: the Court considered only "whether the temporary detention of a motorist" violated the Fourth Amendment. *Whren*, 517 U.S. at 808. The court below therefore erred in citing it as a basis for not balancing the competing interests implicated by these facts, balancing this Court has done in numerous decisions. *See, e.g., Garner*, 471 U.S. at 9-11, 20-21 (1985) (balancing competing governmental and individual interests to conclude that use of deadly force to apprehend a burglary suspect was unreasonable under the Fourth Amendment); *United States v. Place*, 462 U.S. 696, 703-06 (1983) (balancing competing governmental and individual interests to conclude that briefly detaining luggage to be sniffed by a narcotics-detecting dog was reasonable under the Fourth Amendment); *Delaware v. Prouse*, 440 U.S. 648, 654-55, 663 (1979) (balancing competing governmental and individual interests to conclude that stopping an automobile and detaining the driver without an articulable suspicion was unreasonable under the Fourth Amendment).

b. The Fifth Circuit majority ignored the common law.

The court below also went to great lengths to avoid considering whether the common law at the time of the Fourth Amendment's adoption would have prohibited a custodial arrest for a minor criminal offense. The majority opinion

thereby ignored this Court's recent mandate that when determining whether a particular governmental action violates the Fourth Amendment, "we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, ___, 119 S. Ct. 1297, 1300 (1999).

There is significant authority indicating that a custodial arrest would not have been sanctioned at common law for the minor criminal offense at issue in this case. *See, e.g., Carroll v. United States*, 267 U.S. 132, 157 (1925) (quoting Halsbury's Laws of England, Vol. 9, part III, 612) ("A peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence."); *Regina v. Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352 (K.B. 1710) (Lord Holt, J.) (observing that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest").

The *en banc* majority's excuse for not considering this authority was that petitioners had not cited it to the district court or three-judge panel,[4] even though the panel decision itself relied upon common-law authority to reach its decision. There are at least two problems with this position. First, nearly every decision of this Court considering the scope of the Fourth Amendment, including those cited by petitioners

[4] Actually, petitioners did cite the panel to authority addressing the common-law issue. Reply Brief for Appellants at 10, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

at every stage of this case as well as those cited by the majority opinion, rely upon the common law to some extent. Citing any of this Court's Fourth Amendment decisions necessarily means raising principles inextricably linked to the common law. Second, even if there were any merit to the Fifth Circuit's position that not citing specific authorities can waive an argument that supports – and is necessarily included in – an issue that was raised, this Court has made clear that in section 1983 cases, appellate courts are not limited to considering the specific authority cited to the district court. *Elder v. Holloway*, 510 U.S. 510, 511-12 (1994) (qualified immunity dispositions reviewed in light of all relevant precedents, not simply those cited to, or discovered by, the district court).

Whether analyzing the common law is a threshold inquiry in Fourth Amendment analysis, *Houghton*, 526 U.S. at ___, 119 S. Ct. at 1300, or the common law "forms a part of the reasonableness inquiry," *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995), it is inseparable from the Fourth Amendment. A court considering a Fourth Amendment issue cannot just pretend the common law does not exist.

c. The *en banc* majority eviscerates the holding of *Knowles v. Iowa*.

This Court held in *Knowles v. Iowa* that a police officer could not search a car following a traffic stop where the officer issued the driver a citation and had not placed the driver under arrest. *Knowles v. Iowa*, 525 U.S. 113, 114 (1998). The court below, however, held that an officer may place a person under custodial arrest whenever an officer has probable cause to believe that any traffic violation has occurred, however minor.

This eviscerates any protection provided by *Knowles* against full searches of vehicles following traffic stops when there is no justification for a search other than the traffic violation itself. Any officer wishing to avoid the holding of *Knowles* need only place the driver under custodial arrest for the traffic violation, and thereafter search the vehicle as a search incident to arrest. *United States v. Robinson*, 414 U.S. 218 (1973).[5] If the majority's decision is allowed to stand, the holding of *Knowles* will cease to provide any protection to the average citizen. And even worse, it will *encourage* law enforcement officers who wish to search automobiles after traffic stops to place drivers under custodial arrest for even the most insignificant traffic violations.

II. This Case Offers a Particularly Suitable Vehicle for Resolving this Important Issue.

This case presents the ideal factual framework to consider the question presented. While *Ricci v. Village of Arlington Heights* appeared at first blush to frame the Fourth Amendment issue well, this case is better, surpassing *Ricci* on every comparison. Further, the issue comes to this Court after having been addressed in depth by five written opinions in the Fifth Circuit. Finally, the straight-forward and commonplace facts of this case highlight the nature of a full custodial arrest and will not cloud resolution of the legal issue.

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[5] Indeed, an inventory search of Ms. Atwater's vehicle was performed in this case.

A. This Case Better Frames the Fourth Amendment Issue than *Ricci v. Village of Arlington Heights*, in Which the Court Granted Certiorari.

Ricci v. Village of Arlington Heights initially appeared to squarely present the Fourth Amendment issue regarding use of custodial arrests for minor offenses. Unfortunately, its clearly-worded question presented was not raised by the facts of the case. The present case, in contrast, has none of *Ricci*'s faults.

First, this case does not have the shortcoming that apparently resulted in the dismissal of the petition in *Ricci*. The seat belt offense for which Gail Atwater was arrested is a criminal offense, albeit a minor one. It is a misdemeanor punishable by a maximum fifty-dollar fine. Tex. Transp. Code Ann. § 545.413(d) (West 1999). In contrast, the business ordinance at issue in *Ricci* was not a criminal offense, but a civil infraction. *See* Transcript of Oral Argument, *Ricci v. Village of Arlington Heights*, No. 97-501, at 14, 33, 36-37, 1998 WL 204590 (April 21, 1998).

There is no dispute that Gail Atwater was subjected to a full custodial arrest. The petitioner in *Ricci* was arguably subjected to something less than a full custodial arrest. Brief of Respondent at 9-10, *Ricci v. Village of Arlington Heights*, (No. 97-501). While Ricci was not handcuffed, Gail Atwater was handcuffed behind her back in full view of her neighbors and her children. *Compare* Brief of Respondent at 3, *Ricci v. Village of Arlington Heights*, (No. 97-501), *with* App. A at 2a, 13a; 195 F.3d at 244; 195 F.3d at 248 (Weiner, J., dissenting); App. B at 30a-31a; 165 F.3d at 382. Ricci was simply brought to the police station for the processing of a bond, and made to wait in a locked interrogation room while this was done. *Ricci*, 116 F.3d at 289. Gail Atwater was

taken to the police station for booking, where her "mug shot" was taken, glasses, jewelry, shoes, and other personal effects were taken away from her, and she was locked in a jail cell. *See* App. A at 13a; 195 F.3d at 248 (Weiner, J., dissenting); App. B at 31a; 165 F.3d at 382-83.

B. The Issue Has Been Thoroughly Considered in Multiple Opinions Produced by the Fifth Circuit's *En Banc* Consideration of this Case.

Because the Fifth Circuit considered this case on rehearing *en banc*, many of the arguments have already been explored in detail by the court below.

The Fifth Circuit was sharply divided on rehearing. The eleven-judge majority opinion concluded that a person may be placed under custodial arrest for *any* criminal offense so long as there is probable cause to believe that the offense occurred. *See* App. A at 3a-5a, 195 F.3d at 244-45.

In contrast, four different written opinions prepared by the six dissenting Judges disagreed with the majority opinion and concluded that the arrest of Ms. Atwater for not wearing a seat belt violated her rights under the Fourth Amendment. *See* App. A at 8a-11a, 195 F.3d at 246-47 (R. Garza, J., dissenting); App. A at 11a-20a, 195 F.3d at 247-51 (Weiner, J., dissenting); App. A at 20a-27a, 195 F.3d at 251-54 (Dennis, J., dissenting); App. B, 165 F.3d 380 (Parker, J.) (adopted as dissenting opinion of Stewart, J., on rehearing *en banc*, App. A at 1a-2a n.*, 195 F.3d at 243 n.*).

In short, the question presented has been considered more thoroughly here than in any other case.

C. This Set of Facts Presents the Issue in a Commonplace Setting Ideal for Consideration by this Court.

Finally, because this case arises from a traffic stop, it is particularly appropriate for consideration of whether the Fourth Amendment limits the use of custodial arrests for minor criminal offenses. This Court is extremely familiar with balancing the competing interests of effective law enforcement and the individual's right to be free from unreasonable governmental intrusions against the factual backdrop of a police officer's stop of a motor vehicle. *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Whren v. United States*, 517 U.S. 806 (1996); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Robbins v. California*, 453 U.S. 420 (1981); *New York v. Belton*, 453 U.S. 454 (1981); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973); *Carroll v. United States*, 267 U.S. 132 (1925). Perhaps this is true because so many Americans are licensed drivers and their most common interaction with police occurs during a traffic stop. The straight-forward facts of this case vary little from the numerous traffics stops that occur every day – except that Gail Atwater was placed under full custodial arrest.

The fact that this was a full custodial arrest of an average citizen after a normal traffic stop makes this case all the more appropriate for consideration by this Court. The Fourth Amendment issue is particularly well-presented because this is *not* a criminal defendant challenging the arrest.

The interests of the majority of law-abiding Americans usually are not well represented by those who raise Fourth Amendment issues before this Court. Most of the Court's

decisions construing the Fourth Amendment involve a criminal defendant contending the exclusionary rule applies, thereby prohibiting the admission of probative evidence.[6]

The interests of criminal defendants and the average citizen are not the same. The natural concern of a criminal defendant seeking to avoid conviction is having the *search* that uncovered incriminating evidence held unconstitutional. The invalidity of an arrest is relevant only to the extent that it can invalidate a search, not because of the intrusive nature of the arrest itself. In contrast, for the average, law-abiding citizen with no contraband or incriminating evidence to hide, most searches are significantly less of a governmental invasion than the traumatic experience of being placed under full custodial arrest.

Members of this Court have recognized this. "[T]he invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the

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[6] As Justice Douglas astutely observed over forty years ago:

> Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals.

Draper v. United States, 358 U.S. 307, 333-34 (1959) (Douglas, J., dissenting).

relatively minor intrusions attending a search of his premises." *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting); *see also United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring) (the custodial arrest, not the search, "is the significant intrusion of state power into the privacy of one's person").

A custodial arrest includes a search of the arrestee's entire body, and of the contents of pockets and any containers found within the person's reach. *New York v. Belton*, 453 U.S. 454, 460-61 n.4 (1981). Likewise, an inventory search of the vehicle may be performed and the vehicle impounded, with money charged for storage and the vehicle's release. *South Dakota v. Opperman*, 428 U.S. 364, 367-76 (1976). Further, the arrestee can experience the public humiliation of being led away in handcuffs, and, once transported to the police station, fingerprinted and booked, and personal items taken away. The person then potentially faces incarceration for as long as forty-eight hours without a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).

The repercussions of a custodial arrest continue after detention ends. The arrest will be a matter of public record, maintained and disseminated, potentially damaging the person's reputation. Further, an arrest record can make it difficult – and at times impossible – to obtain employment.

Although both traffic stops and custodial arrests are Fourth Amendment "seizures," *Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984), it is well-settled that a custodial arrest is a far greater governmental intrusion than the brief roadside detention typically associated with a traffic stop that ends with issuance of a citation. In recognition of this, there are fewer constitutional protections implicated by the lesser

governmental intrusion of the traffic stop. *Berkemer*, 468 U.S. at 437-38, 440 (because traffic stops are "presumptively temporary and brief," *Miranda* warnings need not be given).

For the average motorist, as it was for Ms. Atwater here, a custodial arrest is a greater governmental intrusion than a traffic stop or a search, and far worse than the punishment imposed for the violation itself. *See* App. A at 18a, 195 F.3d at 250 (Weiner, J., dissenting) (noting that the arrest amounted to Officer Turek's punishing of Ms. Atwater, which "is also, at least potentially, an independent violation of the Fifth and Fourteenth Amendments, which permit the infliction of punishment only after a formal adjudication"). This case presents an ideal opportunity to consider a Fourth Amendment challenge to the use of a custodial arrest for a minor criminal offense, a challenge brought by a typical motorist, not motivated by a desire to invalidate a subsequent search and exclude probative evidence.

CONCLUSION

Even the most law-abiding Americans violate minor traffic laws from time to time. They expect that, if observed by a police officer, they will get a ticket. These millions of licensed drivers, however, do not expect to be placed under custodial arrest for traffic offenses punished only by fines. Petitioners respectfully request that this Court grant their petition for writ of certiorari, and address the Fourth Amendment limits on custodial arrests for fine-only traffic offenses — offenses that can be enforced just as effectively by issuing traffic citations.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed November 24, 1999]

No. 98-50302

Gail ATWATER, Individually; Michael Haas, Dr., As next friend of Anya Savannah Haas and Mackinley Xavier Haas, *Plaintiffs-Appellants*,	)
v.	)
CITY OF LAGO VISTA, Bart Turek, and Frank Miller, Chief of Police, Lago Vista, *Defendants-Appellees*.	)

Before KING, Chief Judge, and REYNALDO G. GARZA, POLITZ, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.*

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* Chief Judge King and Judges Jolly, Higginbotham, Davis, Jones, Smith, Duhé, Barksdale, DeMoss, and Benavides concur in the majority opinion. Judge Parker concurs in the dissent of Judge Reynaldo G. Garza. Judges Reynaldo G. Garza, Politz, and Parker concur in the dissent of Judge Wiener. Judge Stewart dissents for the reasons set forth in the panel decision. *See Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999). Judges Reynaldo G. Garza, Politz, and Parker concur in the dissent of Judge Dennis.

EMILIO M. GARZA, Circuit Judge:

Plaintiffs-Appellants Gail Atwater ("Atwater") and Michael Haas ("Haas"), as next friend of Anya Savannah Haas and Mackinley Xavier Haas, appealed the district court's grant of summary judgment in favor of Defendants-Appellees Officer Bart Turek ("Officer Turek"), Police Chief Frank Miller ("Chief Miller"), and the City of Lago Vista. A panel of this court reversed in part and remanded. *See Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999), *reh'g en banc granted*, 171 F.3d 258 (5th Cir.1999). We vacated the panel opinion, see 5th Cir. R. 41.3, and granted rehearing *en banc*.

I

Officer Turek arrested Gail Atwater for failing to wear her seat belt, failing to fasten her children in seat belts, driving without a license, and failing to provide proof of insurance. Officer Turek handcuffed Atwater and took her to jail, where she spent approximately one hour. Atwater appeared before a magistrate and was released after posting bond.

Atwater and her husband, Haas, subsequently brought various federal and state law claims against Officer Turek, Chief Miller, and the City of Lago Vista, arising out of Atwater's arrest.[1] Officer Turek, Chief Miller and the City of Lago Vista moved for summary judgment. The district court granted this motion.

A panel of this court reversed the district court's summary judgment with respect to Atwater's Fourth Amendment unreasonable seizure claim against Officer Turek and the City of Lago Vista and concluded that Officer Turek was not entitled to qualified immunity. *See Atwater*, 165 F.3d at 389.[2] We granted rehearing *en banc* to reconsider the panel decision.

II

To determine the constitutionality of an arrest, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the

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[1] Atwater and Haas alleged causes of action for: (1) Deprivation of Constitutional Rights, (2) Excessive Use of Force, (3) False Imprisonment, (4) Inadequate Training, (5) Failure to Supervise, (6) Intentional Infliction of Emotional Distress, (7) Assault and Battery, (8) Grossly Negligent Hiring and Retention, (9) Conspiracy to Formulate and Enforce a Municipal Policy to Violate Constitutional Rights, and (10) Common Fund.

[2] The panel affirmed the district court's summary judgment on all other claims. *See Atwater*, 165 F.3d at 389. We reinstate this part of the panel opinion.

intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985) (quotations omitted) (alteration in original). If an arrest is based on probable cause then "with rare exceptions . . . the result of that balancing is not in doubt." *Whren v. United States*, 517 U.S. 806, 817, 116 S.Ct. 1769, 1776, 135 L.Ed.2d 89 (1996). In other words, when probable cause exists to believe that a suspect is committing an offense, the government's interests in enforcing its laws outweigh the suspect's privacy interests, and an arrest of the suspect is reasonable. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment. . . .").

We deviate from this principle – that an arrest based on probable cause is reasonable under the Fourth Amendment – only when an arrest is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[3] *Whren*, 517 U.S. at 818,

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[3] Atwater advances an alternative argument for the first time in her *en banc* brief. She argues that in determining whether her arrest violated the Fourth Amendment, we should follow the common law rule that existed when the Fourth Amendment was promulgated, which she claims limited the circumstances under which a misdemeanant could be arrested without a warrant. She did not raise this argument before the district court or the panel that initially considered this case. Instead, the panel considered this argument *sua sponte*, and even though it ruled in Atwater's favor, it declined to do so based on the common law rule. *See Atwater v. City of Lago Vista*, 165 F.3d 380, 386 (5th Cir.1999) (noting the common law rule and stating that "[a]lthough the Fourth

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Amendment and common law do not always coincide, the Supreme Court has recognized the logic of distinguishing between minor and serious offenses in evaluating the reasonableness of a seizure under the Fourth Amendment"). Because Atwater did not properly raise this argument previously, she has waived her right to pursue this issue here. *See Craddock Int'l Inc. v. W.K.P. Wilson & Son, Inc.*, 116 F.3d 1095, 1105 (5th Cir.1997) ("To prevail on an issue raised for the first time on appeal, an appellant must show a plain (clear or obvious) error that affects substantial rights."); *cf. Arenson v. Southern Univ. Law Ctr.*, 53 F.3d 80, 81 (5th Cir.1995) (per curiam) ("Appellant's request [in his petition for rehearing] for Title VII relief is denied because Arenson waived his Title VII claim by failing to seek a ruling on that issue from the Arenson I panel.").

Moreover, Atwater is unable to cite any cases where courts have invoked the common law rule to invalidate warrantless misdemeanor arrests otherwise supported by probable cause. Indeed, the cases uniformly uphold warrantless misdemeanor arrests where probable cause exists, even where variants of the common law standards to which Atwater refers are incorporated into state law and raised before the court. *See Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir.1997) ("To date, neither the Supreme Court nor this circuit ever has held that the Fourth Amendment prohibits warrantless arrests for misdemeanors not committed in the presence of arresting officers."); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir.1995) (rejecting a Fourth Amendment challenge to a misdemeanor arrest when probable cause existed, even though the arrest may have violated the plaintiff's state right "as an alleged misdemeanant to be arrested only when the misdemeanor is committed in the presence of the arresting officer"); *Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir.1991) (upholding a misdemeanor arrest supported by

116 S.Ct. at 1776. For example, it is "necessary actually to perform" a balancing analysis notwithstanding the existence of probable cause when a search or seizure involves deadly force, an unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body. *See id.* (reviewing cases).

After reviewing the record, we conclude that Officer Turek had probable cause to arrest Atwater and that he did not conduct the arrest in such an "extraordinary manner." Neither party disputes that Officer Turek had probable cause to arrest Atwater. Atwater admits that she was not wearing her seat belt and that she had not belted in her children. Operating a motor vehicle without wearing a seat belt violates Texas law,[4] and Officer Turek had discretion to arrest

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probable cause and stating that "[t]he United States Constitution does not require a warrant for misdemeanors not occurring in the presence of the arresting officer"); *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir.1990) ("The requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir.1974) ("We do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence."); *cf. Whren*, 517 U.S. at 819, 116 S.Ct. at 1777 ("Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment. . . .").

[4] Section 545.413 of the Texas Transportation Code provides:

(a) A person commits an offense if the person:

Atwater without a warrant, *see* Tex. Transp. Code § 543.001; *United States v. Wadley*, 59 F.3d 510, 512 (5th Cir.1995) ("Probable cause for a warrantless arrest exists when the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense."). Moreover, there is no evidence in the record that Officer Turek conducted the arrest in an "extraordinary manner, unusually harmful" to Atwater's privacy interests. *Whren*, 517 at 818, 116 S.Ct. at 1776. The only physical contact between Officer Turek and Atwater occurred when he placed her in handcuffs. Atwater admits that she did not suffer any physical harm during or as a result of the arrest. We therefore conclude that, because it was based on probable cause and because it was not conducted in the above-described "extraordinary manner," Officer Turek's arrest of Atwater was reasonable under the Fourth Amendment.[5] *See id.*

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(1) is at least 15 years of age;
(2) is riding in the front seat of a passenger car while the vehicle is being operated;
(3) is occupying a seat that is equipped with a safety belt; and
(4) is not secured by a safety belt.

TEX. TRANS. CODE ANN. § 545.413

[5] Having concluded that Officer Turek's arrest of Atwater did not violate the Fourth Amendment, we need not address whether Officer Turek is entitled to qualified immunity. *See, e.g., Channer v. Hall*, 112 F.3d 214, 219 n. 8 (5th Cir.1997) ("Because we hold that Channer's Thirteenth Amendment rights were not

III

Accordingly, we AFFIRM the district court's summary judgment.

REYNALDO G. GARZA, Circuit Judge, dissenting:

I believe that the original opinion of the panel that I was on, which can be found at 165 F.3d, 380 (5th Cir.1999), is sufficient to show that the seizure and handcuffing of Mrs. Atwater in this case was unreasonable and uncalled for.

I write separately in dissent because I believe that our colleagues in the majority are wrong in not dividing an arrest or a stop and a seizure of the person arrested or stopped.

We have of necessity to keep in mind that this was a traffic stop or arrest of Mrs. Atwater for failure to have her seatbelt or her children's seatbelts on when stopped. As pointed out by my colleague, Judge Parker, and author of the original opinion, Mrs. Atwater's seatbelt offense was a misdemeanor for which she could be fined up to $50 and no more. Her offense would in no way have been a danger to any one else, but herself and her children.

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violated, we do not reach the issue of qualified immunity."). Nor do we discuss the liability of the City of Lago Vista. *See Doe on Behalf of Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 216 (5th Cir.1998) ("Thus, § 1983 municipal liability may be imposed when (1) the enforcement of a municipal policy or custom was (2) 'the moving force' of the violation of federally protected rights.") (quotations omitted)

I have been a Texas lawyer for over sixty years and an Article III Federal Judge in Texas for over thirty-eight years. I think that I can take judicial notice of the fact that in a regular traffic stop; when a person runs a red light, makes a wrong turn, is speeding, or in this case is not wearing a seatbelt, the usual procedure for the officer making the stop or the arrest is to give the accused a citation, which shows the charge against the person driving the car, a notice to appear before a municipal judge on a certain day at a certain time and signed by the accusing officer; which also adds a paragraph that is signed by the accused that they agree to appear on the date and time stated and that is the end of the story.

There are times when during a traffic stop an officer finds that the driver for instance, is driving while under the influence of either alcohol or drugs; the officer sees a gun on the seat of the car; the car smells of marihuana; the officer sees packages of cocaine or some other reason, like a check of the license number of the person stopped shows that the person is a fugitive or has another charge pending; in which case the officer that made the stop seizes the person and takes him or her to the police station to await being taken before a Magistrate, where the officer makes the complaint against the person and the Magistrate then sets a bond or refuses to allow one, whichever he chooses.

There is no evidence in our case that there was any reason for Mrs. Atwater to be seized and taken to the police station where she waited for an hour for a Magistrate to release her.

The majority setting aside the panel opinion makes no mention of an affidavit that is in the Record Excerpts of

appellants, Gail Atwater and her husband, on behalf of two of their children. The affidavit is that of Keith A. Campbell, who was a member of the Recruitment Unit of the Austin Police Department from August 1994 to March 1997. In the affidavit he makes mention of all the things he did when screening applicants for positions in the Austin Police Department. Mr. Campbell states he has reviewed the personnel file of Michael Barton Turek and he can state without reservation that he would not have recommended this individual to be hired by the Austin Police Department for the following reasons:

1. Lack of maturity based on his own explanations of changes in employment in the "reasons for leaving" sub-sections of each employer's identification.
2. Failed two of three reported psychological tests at A.P.D.
3. Failed to provide complete information.

Mr. Campbell's affidavit is an eye-opener of the kind of person Officer Turek, who saw fit to handcuff Mrs. Atwater behind her back for not wearing her seatbelt, is. Mrs. Atwater and her husband have sued the City of Lago Vista for its unreasonable hiring and lack of training of Turek.

Under Texas law, the City of Lago Vista is not responsible for the actions of their police officers unless they violate somebody's Constitutional Rights. Our colleagues in the majority seem to think that if an officer has probable cause to make a stop and an arrest it immunizes them to where they can do whatever they please. This approach is wrong because

in my view, probable cause will never immunize a constitutional violation.

Officer Turek had probable cause to stop the car that was being driven by Mrs. Atwater for failure to have her seatbelt on, but he should have given her a citation to appear instead of seizing her, putting handcuffs behind her back, and taking her to the police station. He would have taken her children with her except that a neighbor that came on the scene took the children to her home.

I strongly believe that my duty under the oath that I have taken, once as a United States District Judge, then as an Appellate Judge, is to uphold the Constitution and Laws of the United States. Under Article IV of the Amendments to the Constitution, the seizure is different then the stop and the arrest of Mrs. Atwater was unreasonable and therefore a violation of the Constitution of the United States. I cannot see why some of my colleagues are unwilling to say that the seizure by Officer Turek was unreasonable.

WIENER, Circuit Judge, dissenting:

Today a majority of this court announces that any full custodial arrest, replete with transportation to jail and booking, is *per se* a reasonable seizure within the meaning of the Fourth Amendment as long as the arresting officer has probable cause to believe that the individual being arrested has violated the law – any law, even an innocuous traffic ordinance. Not only does this holding ignore the Supreme Court's longstanding pronouncements that every Fourth Amendment analysis must turn on a tripartite balancing of individual interests, government interests, and the degree of

certainty that the government interest will be furthered by the search or seizure at issue, but it also turns a blind eye on the extreme facts of this case; facts that so clearly demonstrate an unreasonable seizure that those of my colleagues who concur in the majority opinion should have been tipped off that something must be critically awry with its reasoning. The result reached is so counterintuitive that it cries out for a deeper look. As the Fourth Amendment requires that every seizure must be effected pursuant to a legitimate governmental interest, and as the only conceivable reason for the full custodial arrest at issue here was Officer Turek's illegitimate desire to punish Atwater, I respectfully dissent.

I

When, as here, the facts virtually speak for themselves, it is disappointing – even if not surprising – that the majority opinion goes out of its way to sanitize them. The instant facts reveal that this case is not truly about a traffic stop followed by an arrest; it is about a police officer going to extreme lengths to satisfy a personal crusade or possibly even a vendetta. The evidence would allow a jury reasonably to infer that Officer Turek had been eagerly awaiting the opportunity to threaten, frighten, and humiliate Gail Atwater: Approximately two months prior to the incident in question, Officer Turek had pulled Atwater over for a putative seatbelt violation; however, much to his dismay, he had been forced to let her drive off without his issuing her a citation when he discovered that she and the other occupants of her car had their seatbelts securely fastened.

Officer Turek's frustration over this prior incident was made readily apparent from the very beginning of the traffic

stop and arrest that are now under review. When Atwater was pulled over this time, she was driving her two children, ages six and four, home from soccer practice. She was traveling in a residential neighborhood, on bone-dry streets, in broad daylight, and at a reasonable, lawful rate of speed. When Officer Turek observed that neither Atwater nor her children were wearing seatbelts, he proceeded to pull her car over. According to the testimony, Officer Turek approached Atwater's car and yelled at her in a belligerent and threatening manner, pointing his finger menacingly in Atwater's face and terrifying her and her young children. Officer Turek screamed that they had "had this conversation before" and that this time she (Atwater) was going to jail.

Officer Turek then ordered Atwater to produce her driver's license and proof of insurance. Atwater informed him that both documents had been in her purse when it was stolen two days earlier. She did, though, provided him with her license number and address from her checkbook. Despite the fact that Officer Turek had seen Atwater's driver's license and proof of insurance when he had pulled her over only weeks earlier, he proceeded to make good on his promise to take her to jail. First, he had her step out of her car; next, he handcuffed her behind her back; then he loaded her into the back of his squad car and took her to the police station; and there she was forced to remove her shoes and glasses, empty her pockets, and allow her "mug shot" to be taken. Finally, Atwater was placed in a jail cell and made to wait for approximately one hour before being produced before a magistrate.

II

The law is long and well established that, under the Fourth Amendment, the scope of a search or seizure "must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (citation omitted). Implicit in this simple but forceful statement of the law – and explicit in its application by the Supreme Court to a broad panoply of cases – is the precept that the permissibility of any search or seizure depends on a balancing of (1) the government's purported interest in effecting the search or seizure, (2) discounted by the degree of certainty that the search or seizure will in fact further the government's interest, against (3) the extent of any infringement on the targeted individual's constitutionally protected privacy and liberty interests.[1]

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[1] Thus, the Supreme Court has held that the government's interest in protecting police officers is sufficient to justify a limited "stop and frisk" of an individual when supported by reasonable suspicion that the individual is carrying a weapon. *Terry*, 392 U.S. at 27, 88 S.Ct. 1868. But the same governmental interest is insufficient to justify the "wholly different kind of intrusion" involved in an arrest absent a greater degree of certainty – namely, probable cause – that the seizure will vindicate the governmental interest in question. *Id.* at 26, 88 S.Ct. 1868.

Similarly, although reasonable suspicion is sufficient to justify a "stop and frisk" for the purpose of protecting the police, the same quantum of certainty is insufficient to justify a "stop and frisk" for the less important and more generalized governmental interest in investigating and preventing crime. *Id.* at 22-23, 26-27,

The problem I perceive with the majority opinion is that its analysis focuses solely on the quantum of certainty involved in the case, to the exclusion of the other two relevant variables: the importance of the government's interest and the extent of the intrusion on the individual's liberty and privacy interests. This is all the more regrettable in light of the fact that quantum of certainty is not even at issue here: Atwater concedes that Officer Turek had probable cause to believe that she had broken the law by failing to wear a seatbelt. Indeed, Atwater further acknowledges that the government's interest in enforcing the traffic laws was sufficient to justify Officer Turek's decision, based on probable cause, to effect a traffic stop, and that the same interest would have justified his issuing her a citation. What Atwater vehemently denies, though, is that the government had any legitimate interest whatsoever – whether on the basis of reasonable suspicion, probable cause, or even absolute certainty – in effecting her

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88 S.Ct. 1868 (holding that a generalized interest in crime prevention justifies "approach[ing] a person for purposes of investigating possibly criminal behavior," but that it is "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon" that supplies the justification for the intrusion involved in a stop and frisk). The Supreme Court applied the same framework in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), when it held that the government's interest in enforcing the criminal laws is sufficient to justify an arrest that is supported by probable cause to believe that a suspect has committed a burglary, but that the government cannot employ the more extreme form of seizure involved in the use of deadly force absent the more important governmental interest of protecting the public from the threat of serious bodily harm.

full custodial arrest and transporting her to jail when the issuing of a citation would have fully protected and vindicated all of the government's interests.

"The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Id.* at 28-29, 88 S.Ct. 1868; *see also United States v. Place*, 462 U.S. 696, 707-08, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). The mere fact that Officer Turek was justified in pulling Atwater over, and would have been justified in issuing her a citation, does not necessarily mean that he was justified in taking the far more intrusive step of effecting her full custodial arrest, complete with behind-the-back handcuffing, transporting to jail, and booking. "In justifying [a] particular intrusion [a] police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21, 88 S.Ct. 1868. In other words, to justify each successive, increasingly stringent intrusion on an individual's liberty and privacy interests, a police officer must at a minimum be able to articulate *some* reason why it was necessary to effect the further intrusion. The articulated reason does not need to be independent of the reasons that justify the initial intrusions: "The test is whether those interests are sufficiently substantial, not whether they are independent of the interest in investigating crimes effectively and apprehending suspects." *Place*, 462 U.S. at 704, 103 S.Ct. 2637. But if the identified reasons for both the initial and the successive intrusions are the same, a police officer must be able to advance a plausible claim that the initial intrusions were inadequate fully to serve

the proffered governmental interests.[2] If the officer cannot plausibly make that claim – in other words, if there were *no legitimate reasons* for the further intrusions – then the heightened intrusions are by definition "unreasonable."

I agree with the majority that the courts should avoid getting into the business of micro-managing arrests. I do not agree, however, that a jurisprudence that is faithful to the fundamental principles of the Fourth Amendment – and that thus would find a Fourth Amendment violation in the instant case – requires the courts to engage in such a practice. In the overwhelming majority of cases, when a police officer has probable cause to believe that an individual has violated or is violating the law, there are good and obvious reasons for that officer to arrest the individual. Examples of reasons that justify a police officer's effecting an arrest include risk of flight, *see United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); need to interrogate an individual or search him for evidence, *see New York v. Harris*, 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990); and need to protect the community from any threat that an individual poses to its safety, *see generally Bass v. Robinson*, 167 F.3d 1041, 1045 (6th Cir.1999); *Dunn v. Denk*, 79 F.3d

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[2] This is an objective standard rather than a subjective one. *See Whren v. United States*, 517 U.S. 806, 814, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."). Thus, the question is not whether the police officer had a plausible reason in mind at the time of the arrest, but rather whether the facts, viewed objectively and from a distance, admit of a plausible reason justifying the arrest.

401, 408 (5th Cir.1996), *cert. denied*, 519 U.S. 813, 117 S.Ct. 61, 136 L.Ed.2d 23 (1996).

Clearly, none of these or other similar reasons are applicable to Officer Turek's arrest of Atwater. She is a local resident, well-known to Officer Turek. There is no indication that she posed even a minimal flight risk. The evidence amply demonstrates that she did not pose any threat to the officer or the community. And there was no need to conduct any further investigation, as the full extent of Atwater's violation of the seatbelt law had already been clearly ascertained. By this process of elimination, then, the one and only conclusion that can be reached on the evidence is that the sole reason Officer Turek arrested Atwater was his determination to inflict punishment on her, above and beyond the $50.00 fine prescribed by Texas law. Not only is the arresting officer's personal desire to punish a constitutionally illegitimate reason under the Fourth Amendment for effecting a seizure; it is also, at least potentially, an independent violation of the Fifth and Fourteenth Amendments, which permit the infliction of punishment only after a formal adjudication. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir.1993). Allowing Officer Turek to skate here gives the officer on the street carte blanche to be a one-person cop cum judge cum jury cum executioner: In effect, he can arrest, charge, try, convict, and both assess and inflict punishment.

The desire of the majority of my esteemed colleagues to arrive at a simple, bright-line rule that can be easily applied

by officers in the field is both understandable and laudable.[3] But such "a rigid all-or-nothing model of justification and regulation under the Amendment" ignores the complexity of real-world events and thus fails to remain faithful to the fundamental principles underlying the Fourth Amendment. *See Terry*, 392 U.S. at 17, 88 S.Ct. 1868. It also has the unfortunate effect of licensing the admittedly rare rogue patrol officer to inflict vigilante punishment on a citizen under the guise of an arrest – a state of affairs that the Constitution clearly does not tolerate.

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[3] The majority claims that its holding is mandated by language found in *Whren*, 517 U.S. at 818, 116 S.Ct. 1769 ("Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests"). Not only is this language dicta, however – the *Whren* court was assessing the validity of a traffic stop, not a full custodial arrest--but it arguably supports my position rather than the majority's. "Extraordinary" is defined in Webster's Dictionary as "going beyond what is usual, regular, or customary." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 296 (1965). Of course, what qualifies as "usual, regular, or customary" is entirely dependent on the circumstances; an action that would be deemed an extraordinary response to one set of facts might be thought quite ordinary and commonplace if the facts were different. It need hardly be said that a full custodial arrest, complete with behind-the-back-handcuffing, transporting to jail, and booking, is an extraordinary response to a local mother's daytime seatbelt violation.

The rule that I would apply to this case has the virtue of being just as simple as the majority's, and thus just as easy for the police to apply in the myriad complex and confusing situations that they regularly encounter, without, however, jettisoning the fundamental principles embodied in the Fourth Amendment. Simply stated: Before a police officer can constitutionally place an individual under full custodial arrest, even with probable cause, the officer must have a plausible, articulable reason for effecting such an intrusion – a reason other than a desire on the part of the officer to punish the individual for his or her conduct.[4] This is hardly a burdensome imposition on the police; I cannot see any reason for the police to complain about having to articulate some manner of justification for the significant intrusion on Fourth Amendment privacy and liberty interests inherent in effecting any full custodial arrest.

Try as I may, I can discern no legitimate justification whatsoever for Officer Turek's lamentable decision to arrest, handcuff, transport, book, and jail Atwater; conversely, I see every indication that Officer Turek's sole purpose in doing so was unilaterally to inflict an illegitimate – and unconstitutional – punishment on her. For these reasons, I must respectfully dissent.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent.

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[4] This is an objective standard, rather than a subjective one. *See supra* note 2.

The majority opinion does not address an important constitutional issue raised by this case, discussed extensively at oral argument, and fully considered by the en banc court: whether the Fourth Amendment, by incorporating the common law at the time it was framed, prohibits, as an unreasonable seizure, the warrantless full custodial arrest of an individual for a fine-only criminal misdemeanor that does not constitute or involve a breach of the peace.

The Supreme Court granted *certiorari* in order to consider this very issue in *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, *and cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998). However, after oral argument the writ of *certiorari* was dismissed as improvidently granted. *See Ricci v. Village of Arlington Heights*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998). The Supreme Court oral argument transcripts in *Ricci* suggest that the Court dismissed *certiorari* as improvidently granted only because the Court learned for the first time at oral argument that the issue was not actually presented because Ricci's arrest had been based on the violation of a civil business license ordinance rather than a criminal misdemeanor offense. Oral Argument Before the Supreme Court of the United States (1998 WL 204590) at 57-64, *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, *and cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998) (No. 97- 501).

The district court's granting of the defendants' Rule 12(b)(6) and Rule 56 motions is reviewed *de novo* by this court of appeals. *See McConathy v. Dr. Pepper/Seven Up*

Corp., 131 F.3d 558 (5th Cir.1995) (failure to state a claim); *Montgomery v. Brookshire*, 34 F.3d 291, 294 (5th Cir.1994) (summary judgment). In accordance with Fed. R. App. P. 3 and 28, the appellant adequately noticed and argued to this court the issue of whether the warrantless full custodial arrest of a person for violation of a fine-only criminal misdemeanor seat-belt law, involving no breach of the peace, violates that person's Fourth Amendment rights.

The foregoing question of law is the only issue presented by this appeal. The district court concluded that the plaintiffs "have not provided evidence of any violation of a constitutional right, much less a violation of a clearly established constitutional right." The district court based its ruling primarily on the specific finding that the "only alleged 'force' and 'imprisonment' arose out [of] Turek's arrest of Atwater for the seat belt violations as clearly authorized by Texas law."

For purposes of the motion for summary judgment, the district court found that Turek, immediately upon stopping Atwater, yelled at her, "We've met before!" and "You're going to jail!" Based upon these findings and the evidence, it reasonably can be inferred that Turek initially placed Atwater in full custodial arrest based only on the seat belt violations and called for a back up to assist him in his seizure of Atwater, her children, and her vehicle. Consequently, this appeal does not raise the question of whether Turek constitutionally could have made a full custody arrest of Atwater for the additional charges he sometime later filed against her of failure to provide proof of insurance and failure to have her driver's license in her possession. Moreover, the failure to provide evidence of insurance or financial responsibility in itself is not a crime or

offense under Texas law. *See* TEX. TRANSP. CODE § 601.053 (West 1999); Op. Tex. Atty. Gen.1983, No. MW-577. The failure to carry or exhibit a driver's license is a fine-only, non-peace breaching misdemeanor, if, as in this case, it is not a third or subsequent conviction within one year after the date of the second such conviction. *See* TEX. TRANSP. CODE § 521.025. Finally, because Turek recently before had stopped Atwater and had examined her driver's license and evidence of insurance, there is a genuine factual dispute, not amenable to summary judgment, as to whether Turek had probable cause to file the additional charges against Atwater, which were summarily dismissed the same day by the magistrate.

I cannot join the majority opinion because it does not acknowledge or address the arguments in favor of the proposition that an unnecessary full custodial arrest of a person for a fine only criminal misdemeanor involving no breach of the peace is an unreasonable seizure against which the people have been guaranteed a right to be secure in their persons by the Fourth Amendment. Those arguments were set forth fully and very persuasively by the briefs of the petitioner and his amici in *Ricci*. *See, e.g.*, Petitioner's Brief (1998 WL 74152), Reply Brief of Petitioner (1998 WL 167353), Brief of the American Civil Liberties Union and the ACLU of Illinois in Support of Petitioner (1998 WL 77846), Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner (1998 WL 77850), Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner (1998 WL 77847), *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, and *cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998) (No. 97- 501). In summary, I read the arguments to be as follows:

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated[.]" When determining whether a particular governmental action violates the Fourth Amendment, the Supreme Court has said that the first inquiry is whether the action was regarded as an unlawful search or seizure under the common law when the amendment was framed. *See Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 1300, 143 L.Ed.2d 408 (1999) (citing *Wilson v. Arkansas*, 514 U.S. 927, 931, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *California v. Hodari D.*, 499 U.S. 621, 624, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)). "Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate interests." *Houghton*, 119 S.Ct. at 1300 (citing, *e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)).

The common law prohibited the warrantless arrest of an individual for a misdemeanor unless it involved a breach of the peace. As the Supreme Court in *Carroll v. United States*, 267 U.S. 132, 156, 45 S.Ct. 280, 69 L.Ed. 543 (1925) stated:

> "In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

> Halsbury's Laws of England, vol. 9, part. III, 612.
> The reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace (1 Stephen, History of Criminal Law, 193), while the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without warrant (Rohan v. Sawin, 5 Cush. [Mass.] 281).

While the term "peace of the king" at common law meant, in one sense, the "law and sovereignty" of the king in general, with regard to a peace officer's power of arrest the term denoted "some violent or disorderly act causing public alarm or disturbance. . . ." 2 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 436-37 (E.A. Jelf ed., 3d ed.1938). The misdemeanors for which common law allowed custodial arrest were serious offenses, including assaults and other dangerous and disruptive acts, or public disturbances. *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572-77 (1923-24).

Applied to the case at hand, it seems evident that the failure to buckle a seat-belt hardly conjures up images of the "violent or disorderly acts" contemplated by the common law as warranting a full custodial arrest. *See* SIR WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 811 (Bernard C. Gavit ed. 1892) (listing offenses against the public peace as riotous assemblages, unlawful hunting, threatening letters, destruction of locks or flood-gates, and affrays). Gail

Atwater's infraction of the Texas fine-only criminal misdemeanor seat-belt law did not constitute or portend any disturbance that would even approach a breach of the peace under the common law when the Fourth Amendment was framed. Therefore, the initial inquiry required by the Supreme Court's decisions yields the answer that Turek's full custodial arrest of Atwater for that infraction violated her right under the Fourth Amendment to be secure in her person against unreasonable seizures.

Even if the historical evidence were thought to be equivocal, *see Houghton*, 119 S.Ct. at 1302, the panel opinion in this case demonstrates that the balancing of the relative interests weighs decidedly in favor of protecting the personal privacy and personal dignity of an individual from an intrusion that must surely be an annoying, frightening, and humiliating experience. *See Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999). In this case in which there is substantial and perhaps conclusive evidence that the governmental action would have been regarded as an unlawful search or seizure under the common law when the amendment was framed, the panel opinion also is very persuasive in its evaluation of the seizure under the traditional standards of reasonableness and its conclusion that the degree to which the seizure intrudes upon an individual's privacy and dignity undoubtedly outweighs the degree to which it is needed for the promotion of legitimate governmental interests. *Id.*

The majority opinion affirms the district court's summary judgment without undertaking the first or the second inquiry demanded of us by the Fourth Amendment and the Supreme Court's decisions in *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), *Wilson v.*

Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) and *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). The Supreme Court's reaffirmation of our duty to make these inquiries subsequent to its decision in *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), and the Supreme Court's recent willingness to examine the issue of warrantless custodial arrests for peace - breachless fine - only misdemeanors in *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir.1997), *cert. granted*, 522 U.S. 1038, 118 S.Ct. 679, 139 L.Ed.2d 627, *and cert. dismissed*, 523 U.S. 613, 118 S.Ct. 1693, 140 L.Ed.2d 789 (1998), convinces me that the majority is mistaken in assuming that our obligation to carefully scrutinize intrusions upon the right of the people to be secure in their persons has been totally displaced by a simple *Whren* probable cause matrix. Accordingly, because the majority used an inappropriate truncated analysis to reach what appears to be an incorrect result, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed January 29, 1999]

No. 98-50302

Gail ATWATER, Individually; Michael Haas, Dr., As next friend of Anya Savannah Haas and Mackinley Xavier Haas, *Plaintiffs-Appellants*,	)
v.	)
CITY OF LAGO VISTA, Bart Turek, and Frank Miller, Chief of Police, Lago Vista, *Defendants-Appellees*.	)

OPINION

Before REYNALDO G. GARZA, STEWART and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Appellants Gail Atwater and Michael Haas, as next friend of Anya Savannah Haas and Mackinley Xavier Haas, appeal the decision of the district court granting defendants, City of Lago Vista, Bart Turek, and Frank Miller, summary judgment. Finding error, we reverse in part and remand.

BACKGROUND

Gail Atwater and her family are long-term residents of Lago Vista, Texas, a suburb of Austin. She is a full-time mother and her husband is an emergency room physician at a local hospital. On the pleasant spring afternoon of March 26, 1997, as Gail Atwater was driving her children home after their soccer practice at 15 miles per hour through her residential neighborhood, she violated Section 545.413 of the Texas Transportation Code. Neither Gail Atwater, her four-year-old son nor her six-year-old daughter were wearing their seat belts. Detecting this breach of the peace and dignity of the state, Lago Vista police officer, Bart Turek, set about to protect the community from the perpetration of such a crime. In doing so, he brought to bear the full panoply of means available to accomplish his goal - verbal abuse, handcuffs, placing Gail Atwater under custodial arrest, and hauling her to the local police station. It was not a proud moment for the City of Lago Vista.

When Officer Turek pulled over Atwater's pickup, she and her children remained in the vehicle. Officer Turek approached the driver's side window and aggressively jabbed his finger toward her face. Turek screamed either that they had met before or had this conversation before. Turek's conduct frightened her children, so Atwater calmly and in a normal tone requested that Turek lower his voice. According

to Atwater, the request that Turek lower his voice further triggered his wrath. Turek responded immediately by telling Atwater that she was going to jail. Atwater remained calm. Atwater was not acting suspiciously, she did not pose any threat to Turek, and she was not engaged in any illegal conduct other than failing to wear a seat belt when Turek told her she was going to jail.

Turek continued to speak to Atwater in a verbally abusive manner, accusing her of not caring for her children. Atwater's children and bystanders including friends and other Lago Vista residents who drove or walked by witnessed Turek's tirade. Turek stated that he recently stopped Atwater for not having her children in seat belts, but such was not the case. Turek had in fact stopped her several months before for allowing her son to ride on the front seat arm rest, but the seat belt was securely fastened. No citation was issued.

After telling Atwater that she would be taken to jail, Turek demanded her driver's license and proof of insurance. When Atwater informed Turek that her license and insurance card were in her purse that had been stolen a couple of days before, Turek ridiculed her and implied she was a liar, even though, assuming he followed standard procedures during the previous stop, he knew she had a valid driver's license and was an insured driver. Atwater eventually provided her driver's license number and address from her check book. Atwater then asked Turek to allow her to take her children to a friend's home just two houses down before taking her to jail, but he refused her request. Turek stated that her children could accompany her to the police station. Fortunately, a friend of Atwater's who came to the scene took the children into her care.

Although under Texas law Turek could have issued Atwater a traffic citation if she signed a promise to appear,[1] he instead chose to handcuff Atwater with her hands behind her back, load her into his squad car, and take her to the police station. Once at the police station, Atwater was required to remove her shoes and glasses, empty her pockets and have her picture taken. She was then placed in a jail cell for approximately one hour before being taken before a magistrate.

Atwater pleaded no contest to not wearing a seat belt and allowing her children to not wear seat belts. Charges of driving without a license or proof of insurance were dismissed. This incident caused Atwater and her children extreme emotional distress and anxiety. Her youngest child has required counseling, and Atwater has been prescribed medication for nightmares, insomnia, and depression resulting from this incident.

Frank Miller, the chief of police for Lago Vista, was the ultimate authority in the police department in the areas of management of department personnel. Lago Vista's policy for enforcement of traffic violations allows for the use of custodial arrests to promote its goals of increased traffic ordinance compliance. The policy specifically leaves to the officer's judgment whether to take a motorist into custody for violations of a traffic ordinance, and according to Appellants, encourages the very conduct engaged in by Officer Turek.

Atwater and her husband, as next friend for her children, brought suit against the City of Lago Vista, Police

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[1] *See* TEX. TRANSP. CODE ANN. § 543.005

Chief Miller, and Officer Turek under 42 U.S.C. § 1983 and § 1985 alleging *inter alia* violations of Atwater's Fourth Amendment rights to be free from unreasonable seizures and excessive force and punishment as well as her right to due process under the Fifth and Fourteenth Amendments. Atwater also brought state law claims for false imprisonment and intentional infliction of emotional distress. A claim for intentional infliction of emotional distress was brought on behalf of her children.

The defendants filed a Rule 12(b)(6) motion to dismiss, or alternatively, a motion for summary judgment based in part on qualified immunity. The district court granted summary judgment holding that the plaintiffs had not identified a constitutional right that had been violated and that the individual defendants had not acted in an objectively unreasonable manner. With respect to the Fourth Amendment unreasonable seizure claim, the district court found that the plaintiffs failed to state a claim. With respect to the claims against the municipality, the district court found that although the plaintiffs proved "policy or custom" they failed to offer evidence of an underlying unconstitutional activity. The district court also granted summary judgment on the state law claims. Atwater and her children timely appeal.

ANALYSIS

We review the grant of summary judgment *de novo* applying the same standard as the district court. *See Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir.1998). For purposes of summary judgment, the court considers the evidence of the nonmovant plaintiffs as true and draws all inferences in the

nonmovants' favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

I. *FAILURE TO STATE A CLAIM*

With respect to Appellants' Fourth Amendment unreasonable seizure claim, the district court concluded that the Appellants failed to state a claim because they did "not allege with any particularity what conduct violated what provision of the Constitution." Order of February 13, 1998, p. 5. This conclusion of the learned district judge misses the mark. Appellants' First Amended Petition alleged facts to support an unreasonable seizure claim under the Fourth Amendment. Appellants alleged that Officer Bart Turek stopped Atwater for not wearing a seat belt and not having her children properly seatbelted in the vehicle. Appellants further alleged that Officer Turek began yelling at her, telling her she was going to jail. According to Appellants, Officer Turek then continued to abuse her verbally, handcuffed her, and took her to jail, for a mere seat belt violation. Appellants alleged that this constituted an unreasonable seizure under the Fourth Amendment. *See* First Amended Petition, p. 11. We find that facts were alleged with sufficient particularity to state a claim under the Fourth Amendment.

II. *QUALIFIED IMMUNITY AND OFFICER TUREK*[2]

Although the district court dismissed Appellants' Fourth Amendment claim for failure to state a claim, the Appellees presented an argument on summary judgment that the individual defendants were also entitled to qualified immunity. *See* Rule 12(b)(6) Motion for Dismissal, Or, In the Alternative, Rule 56 Motion and Brief for Summary Judgment, p. 19. Although it appears that this section of the summary judgment brief focuses only on the qualified immunity defense of Chief Miller and never mentions Officer Turek by name, portions of the brief do allude to the "individual defendants," which ostensibly includes Officer Turek. We shall give Appellees the benefit of the doubt that they were asserting qualified immunity on behalf of both Chief Miller and Officer Turek.

Determining whether an official is entitled to qualified immunity is a two-step process requiring the court to determine (1) whether the plaintiff has alleged a violation of a clearly established constitutional right and (2) whether the official's conduct was objectively reasonable in light of clearly established law as it existed at the time of the conduct in question. *See Stefanoff v. Hays County*, 154 F.3d 523, 525 (5th Cir.1998). Although Atwater concedes that Turek had probable cause to stop her for failure to wear a seat belt, Atwater challenges the reasonableness under the Fourth

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[2] We discuss only the issue of the Fourth Amendment unreasonable seizure claim because it is the claim which the court considers to have merit. The judgment of the district court on the other claims asserted by Appellants will be affirmed.

Amendment of her arrest for violation of the Texas seat belt law.

A. Clearly Established Law

The way one states the legal principle which must be clearly established before liability can attach is oftentimes outcome-determinative. In that vein, the defendants point out that no case exists which calls Officer Turek's actions into question; thus no clearly established law exists. Indeed we have found no case where a court was asked to consider an officer's action of arresting, handcuffing, booking, and holding a first-time seat belt violator in jail. But that does not conclude the inquiry. The paucity of similar factual scenarios that have found their way into published legal opinions may be attributable to law officers acting in a more responsible and professional manner than Bart Turek acted on this occasion. Or in those instances where similar abuses took place, perhaps the victims either were without the resources to call the officer's hand or chose to avoid further involvement with a justice system so lacking in common sense and reasonableness.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It has long been clearly established that there is a constitutional right to be free from unreasonable seizures. *See, e.g., Brower v. County of Inyo*, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Further, it is clearly established that even where there is probable cause to believe an offense has been committed, any seizure which is conducted in an extraordinary manner or which constitutes an extreme practice must meet the reasonableness requirement of the Fourth Amendment.[3] *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (finding that when an arrest requires the use of deadly force, probable cause is not sufficient and the means for the arrest must be reasonable); *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (holding that warrantless arrest of a suspect in his home for a traffic offense was unreasonable); *New York v. Payton*, 445 U.S. 573, 585, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) ("the warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable"); *Jones v. United States*, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) (probable cause insufficient for warrantless arrest in farmhouse at night).

B. Objective Reasonableness

The Texas seat belt law is one of a number of paternalistic statutes enacted by the Texas Legislature, the violation of which usually exposes the offender to the

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[3] *See Whren v. United States*, 517 U.S. 806, 818, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), and discussion *infra*.

imposition of a fine. *See, e.g.*, Tex. Trans. Code Ann. § 545.413 (requiring the driver, front-seat passenger, and children from ages four to fifteen to wear a seat belt); Tex. Trans. Code Ann. § 545.414 (prohibiting a child under twelve years of age to ride in the open-bed of a pickup truck); Tex. Trans. Code Ann. § 545.419 (prohibiting a person from occupying a house trailer while it is being moved); Tex. Parks & Wildlife Code Ann. § 31.066 (requiring life preservers on motorboats and requiring passengers under 13 years of age to wear life preservers). We refer to these laws as paternalistic because they are designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large. We contrast these paternalistic statutes with most traffic laws, the violation of which can have an immediate impact on other users of streets and roadways. *See, e.g.*, Tex. Penal Code Ann. § 49.04 (prohibiting the operation of a motor vehicle while intoxicated); Tex. Trans. Code Ann. § 545.351-352 (requiring motorists to drive within speed limits); Tex. Trans. Code Ann. § 545.401 (prohibiting reckless driving); Tex. Trans. Code Ann. § 545.104 (requiring the use of turn signals). In order to determine the objective reasonableness of Officer Turek's actions we must understand the nature of the offense involved and who the law is designed to protect because that helps us weigh the governmental interest in arresting a violator versus the individual's privacy interest under the Fourth Amendment.

Atwater's operation of a motor vehicle without wearing a seat belt and without her children wearing a seat belt in the front seat was a violation of § 545.413 of the Texas Transportation Code. Violation of the Texas Seat Belt Law is a "misdemeanor punishable by a fine of not less than $25 or more than $50." Tex. Trans. Code Ann. § 545.413(d). No

jail term is provided in the statute. Under the Texas Code an officer has the discretion to allow a motorist to secure release upon arrest by making a written promise to appear in court. *See* Tex. Trans. Code Ann. § 543.005. Once a motorist provides a written promise to appear by signing the citation, an officer is required to promptly release the motorist. *See id.* Section 543.001 of the Texas Transportation Code provides that: "Any peace officer may arrest without warrant a person found committing a violation of this subtitle." However, any decision to arrest and the circumstances surrounding the arrest must be considered within the confines of the Fourth Amendment.

Although the statute provides that persons "may" be arrested for seat belt violations, it does not provide that in all circumstances an arrest is appropriate. Certainly a statute which authorizes arrest for a mere seat belt violation in every instance would be subject to a Fourth Amendment challenge.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court held that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest. In reaching this conclusion, the Court explained that "[t]o determine the constitutionality of a seizure 'we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* at 8, 105 S.Ct. 1694 (citations omitted). That "reasonableness depends on not only when a seizure is made, but also how it is carried out." *Id.* The Supreme Court's Fourth Amendment jurisprudence makes clear that in

determining reasonableness, we must ask "whether the totality of the circumstances justified a particular sort of search or seizure." *Id*. 8-9, 105 S.Ct. 1694.

Appellees argue that Officer Turek's actions were justified because he had probable cause [4] to believe a seat belt violation had occurred, and the Texas statute authorized the arrest. It is not that simple. Officer Turek cannot hide behind the Texas seat belt law to legitimate his actions. Most recently in *Knowles v. Iowa*, --- U.S. ----, 119 S.Ct. 484, ---- L.Ed.2d ---- (1998), the Supreme Court examined the question of whether a search incident to traffic citation authorized by Iowa law nonetheless violated the Fourth Amendment. Implicit in the Court's decision that the actions of the officer violated the Fourth Amendment is the realization that the existence of the Iowa statute did not obviate the need for an independent Fourth Amendment analysis. "Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity." *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir.1994). Defendants' reading of the Texas Seat Belt Law would be patently violative of the Fourth Amendment because it would read the reasonableness requirement out of the Amendment.

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[4] Probable cause occurs when the facts and circumstances within an officer's knowledge are sufficient to warrant a prudent man in believing that a person committed or was committing an offense. *See Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

However, it is a cardinal principle that courts will construe a statute to avoid a constitutional problem. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932). In doing so, we do not interpret the Texas statute to authorize arrest in every instance. To the contrary, the statute necessarily requires the exercise of discretion in the decision to arrest or not–reasonableness being the key in exercising that discretion.

At common law the general rule was:

> In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.

Carroll v. United States, 267 U.S. 132, 157, 45 S.Ct. 280, 69 L.Ed. 543 (1925) (quoting Halsbury's Laws of England, vol. 9, part. III, 612). Early common law prohibited arrest for very minor offenses. *See* Barbara C. Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 TEMP. L. REV. 221, 258- 59 (1989) (citing W. Paley, THE LAW AND PRACTICE OF SUMMARY CONVICTIONS 19 (London 1814)).

Although the Fourth Amendment and common law do not always coincide, the Supreme Court has recognized the

logic of distinguishing between minor and serious offenses in evaluating the reasonableness of a seizure under the Fourth Amendment. Indeed, this is not a novel idea. *See Gustafson v. Florida*, 414 U.S. 260, 266-67, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973) (Stewart, J., concurring) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"). In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984), police officers arrived at the scene of a traffic accident and obtained information indicating that the driver of the automobile involved was guilty of a first offense of driving while intoxicated. The driver left the scene of the accident, and the officers followed the suspect to his home where they arrested him without a warrant. Absent exigent circumstances, the warrantless invasion of the home was a clear violation of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). In holding that the warrantless arrest for a traffic offense was unconstitutional the Court stated:

> When the government's interest is only to arrest for a minor offense, . . . the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh, 466 U.S. at 750, 104 S.Ct. 2091. In this case, had Officer Turek gone to a magistrate, undoubtedly no arrest warrant would have been issued.[5]

Even Justice White, in dissenting in *Welsh* stated:

> The gravity of the underlying offense is, I concede, a factor to be considered in determining whether the delay that attends the warrant-issuance process will endanger officers or other persons. The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately.

466 U.S. at 759, 104 S.Ct. 2091. In this case there is not the slightest hint of exigent circumstances.

Appellees urge this court to recognize the significant body of authority which appears to indicate that all seizures are reasonable under the Fourth Amendment if based upon probable cause. *See, e.g., United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (where the arrest

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[5] Justice Jackson writing in concurrence in *McDonald v. United States*, 335 U.S. 451, 459-60, 69 S.Ct. 191, 93 L.Ed. 153 (1948), explained his view about warrantless home arrests for minor offenses: "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant."

for a felony occurring in a public place during the daytime required only probable cause to be constitutional). ***But see*** 3 Wayne R. LaFave, SEARCH AND SEIZURE § 5.1(b) (3d ed.1996) (criticizing *Watson* as remarkable for its lack of analysis); *see also Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) (noting that the constitutional validity of an arrest turns upon whether the officer had probable cause to make the arrest). Once again, this is an oversimplification of the status of our Fourth Amendment jurisprudence. Most recently, in *Whren v. United States*, 517 U.S. 806, 817-18, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the Supreme Court explained that although the general rule is that the "reasonableness" of a search or seizure is not in doubt where the search or seizure is based upon probable cause, a balancing of all relevant factors is necessary under the Fourth Amendment when the search or seizure is conducted in an "extraordinary manner" or constitutes an "extreme practice." *Id.* The Court cited *Tennessee v. Garner* and *Welsh v. Wisconsin*, among others, as examples of seizures conducted in an extraordinary manner, i.e., "unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818, 116 S.Ct. 1769.

In *Whren*, the Court faced the issue of whether a temporary detention of a motorist based upon probable cause that he violated a traffic law was unconstitutional under the Fourth Amendment. The Court concluded that a traffic stop by an out-of-uniform officer did not rise to the level of an extreme practice to warrant the reasonableness analysis employed in cases where a seizure was conducted in an extraordinary manner. *See id.* This is in keeping with the Supreme Court's observation that traffic stops are generally brief in nature and not as invasive as other forms of seizure. *See, e.g., Berkemer*

v. McCarty, 468 U.S. 420, 439 n. 29, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

In light of the Supreme Court precedent clearly established prior to the incident in question, particularly the Supreme Court's explanation in *Whren*, we easily conclude that an arrest for a first-time seat belt offense is indeed an extreme practice and a seizure conducted in an extraordinary manner which requires a balancing analysis to determine the reasonableness of the police activity. In conducting the analysis, we observe that the only possible governmental interest in arresting Atwater for the seat belt offense was enforcement of the seat belt law. Atwater did not pose a threat to the officer's safety; she was not a flight risk; and upon release she would not have posed a danger to society. Atwater was not a repeat offender. The seat belt law could have been enforced equally well through the issuance of a citation. With respect to the method of arrest, there was no good reason for Atwater to be handcuffed behind her back. Upon conducting a balancing test of all relevant factors, we find no factors existing in this case that are appropriate for placement on the side of the scales that would tilt them in favor of seizure. The seizure was objectively unreasonable.

Appellees' citation of *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), is unavailing. In *Robinson*, the parties never challenged the constitutionality of the arrest. *See id.* at 221-22, 94 S.Ct. 467. The challenge in *Robinson* was whether a search incident to a valid arrest following a traffic violation was unconstitutional.

Our research reveals that every case in Texas wherein an individual was custodially arrested after violating the seat

belt law, the arrest ensued only after some additional conduct occurred or some additional factor justifying arrest was revealed. *See, e.g., Madison v. State*, 922 S.W.2d 610 (Tex.App-Texarkana 1996, writ ref'd). In *Madison*, after stopping a driver for failure to wear a seat belt, the officer observed that the inspection sticker on the vehicle had expired more than two years earlier, and after performing a license and registration check, the officer discovered that driver had a felony record. The driver was then arrested and cocaine was discovered during an inventory search. *See also Valencia v. State*, 820 S.W.2d 397 (Tex.App.-Houston [14th Dist.] 1991, writ ref'd). In *Valencia*, officers observed a van blocking the street which drove away as they approached. The officers followed the van and observed it swerving from side to side and into the path of oncoming traffic. The officers stopped the van, noted that the driver appeared to be intoxicated and arrested the driver. The officers observed that the passenger was not wearing a seat belt, that he continually moved his hands despite admonitions to keep his hands where the officers could see them, and that the passenger had no identification. The passenger was arrested and a search of the passenger revealed a large amount of cash and a number of baggies containing what appeared to be cocaine. These cases do not support the proposition that a first-time offender for a seat belt violation should be arrested, handcuffed and hauled to jail.

If we consider Atwater's evidence as true and draw all reasonable inferences in her favor, as we must do on summary judgment,[6] then she has established that Officer Turek's

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[6] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. 2505.

conduct was objectively unreasonable under the Fourth Amendment. Atwater maintains that she was placed under arrest immediately for failing to wear a seat belt. Atwater attests that Turek came at her screaming and verbally abusing her; i.e., his mind was made up before he could find out why the violation occurred. According to Atwater, Turek told her she would be taken to jail almost as soon as he got to her truck. The timing is important.

It is important also to note that in this case Atwater did not refuse to buckle her seat belt or her children's seat belts upon being stopped by Officer Turek. There was no reason to seize her because she was a serious repeat offender. According to Atwater, the previous time Officer Turek stopped her, her son was riding on the arm rest of her truck, but was wearing a seat belt. No citation was issued during this previous stop. Further, Atwater was no flight risk. Officer Turek knew she lived in the neighborhood as he recognized her from the previous stop. She posed no threat to the officer or to others. The only reason to arrest Atwater instead of issuing her a citation under these circumstances was to harass and impose a level of punishment beyond the limitations of the statute. We cannot countenance such abuse from an officer of the law.

Gail Atwater became the victim of an over-zealous police officer who abused the power entrusted to him by the City of Lago Vista.[7] This case serves to remind us that "the

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[7] In expressing disdain at overzealous police activity, our colleague Judge Reavley said in *Morgan v. City of DeSoto*, 900 F.2d 811 (5th Cir.1990), a case where high school students were arrested, handcuffed, and taken to jail because they were

central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz*, 422 U.S. 891, 895, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) (citations omitted). It also presents fundamental questions about the status of Fourth Amendment rights and the lines society is willing to draw concerning the conduct of police officers, the vast majority of whom dutifully carry out their obligations within constitutional limits.

It is also incumbent upon us to place this case into proper perspective. It is and should be the rare case indeed where an individual is placed under arrest for nothing more

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congregating on shopping center parking lots after hours, creating a litter problem:

> Regardless of the visibility of the signs, regardless of whether a class B misdemeanor (criminal trespass) was committed, regardless of whether the officers had a probable cause to arrest, and regardless of how bad a litter problem the shopping centers were having, we can find no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail for the night as if they were threats to society. Whatever the legal points and the liability, how can any party deny that the criminal justice system operated here as an instrument of oppression?

Id. at 814.

than a seat belt violation. However, this decision in no way impacts the plethora of authority justifying brief traffic stops for minor traffic violations. *See, e.g., Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). This decision is limited to its facts. Appellees argue that Officer Turek's actions were justified because he had probable cause to believe a seat belt violation occurred. While we agree that traffic violations can become a serious matter affecting public safety, we cannot agree that the seat belt violation in this case was so dangerous or so serious as to justify arrest.[8] As previously discussed, a seat belt violation affects only the passengers and operator of the vehicle in question. Although the Texas Legislature has decided, and we do not dispute, that the interest in protecting these individuals is an important one, the governmental interest in arresting an individual for a seat belt violation is much less than in the case of other traffic violations which can have an immediate impact on the public at large.

Officer Turek's actions, in this case, under these facts, were constitutionally unreasonable; indeed they were indefensible. He is not, therefore, entitled to qualified immunity.

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[8] We do not address whether the Texas seat belt law is facially constitutional, for no such challenge was presented. This case presents an as-applied challenge. For a discussion on the need for laws mandating use of citation as opposed to arrest to enforce minor traffic laws, see Wayne R. LaFave, 3 SEARCH AND SEIZURE § 5.1(h) (3d ed.1996).

III. *MUNICIPALITY LIABILITY*

Because summary judgment for the municipality was based on failure to identify a constitutional right which had been violated by Officer Turek, that judgment also must be reversed with respect to a Fourth Amendment claim alleging unreasonable seizure.

IV. *LIABILITY OF CHIEF MILLER*

Upon review of the summary judgment record, we fail to see any evidence or argument showing that Chief Miller should be liable on any of Appellants' claims or that he would otherwise not be entitled to qualified immunity. Accordingly, the judgment of the district court dismissing claims against Chief Miller is affirmed.

V. *CONCLUSION*

The judgment of the district court with respect to the Fourth Amendment unreasonable seizure claim under 42 U.S.C. § 1983 against Officer Turek and the City of Lago Vista is reversed. All claims against Officer Turek for unreasonable seizure under the Fourth Amendment are reinstated. The claim under § 1983 against the City of Lago Vista for unconstitutional activity pursuant to official policy or custom as it relates to the alleged unreasonable seizure by Officer Turek is reinstated. The judgment of the district court dismissing all claims against Chief Miller is affirmed. The judgment of the district court is otherwise affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed February 13, 1999]

No. A- 97 CA 679 SS

GAIL ATWATER, Individually; MICHAEL HASS, M.D., As Next Friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,
Plaintiffs,

v.

CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER,
Defendants.

ORDER

BE IT REMEMBERED that the Court held a hearing in the above-styled case on the 26th day of January 1998, at which all parties were present through representation of counsel. The Court heard arguments on Defendants' Rule 12(b)(6) Motion to Dismiss or, in the Alternative, Rule 56

Motion for Summary Judgement [#19], Plaintiffs' Objections to and Motion to Strike Portions of the Affidavit of Frank Miller [#28], and Plaintiffs' Cross-Motion for Partial Summary Judgment and Response to City of Lago Vista Defendants' Motion to Dismiss or in the Alternative for Summary Judgment [#31].

As announced in open court, the plaintiff's claims are meritless. In fact, this case is one of a series of meritless lawsuits against the City of Lago Vista, Bart Turek, and Frank Miller, several of which allege class actions although they all arise from unique individual claims. Because the Court finds the defendants are entitled to judgment as a matter of law and no material issue of fact remains, the Court grants summary judgment to the defendants on all claims for the reasons discussed below. *See* FED. R. CIV. P. 56(c). For purposes of summary judgment, the Court considers the evidence of the plaintiffs, the nonmovants, as true and draws all justifiable inferences in their favor. *See Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986).

I. Background

On March 26, 1997, Gail Atwater was driving her Dodge Ram pickup truck in a residential neighborhood in Lago Vista, Texas. Her four-year-old son Mackinley was seated in the middle of the front seat, and her six-year-old daughter Anya was seated on the passenger side, and both children as well as Atwater were not wearing seat belts. Atwater was stopped by Lago Vista police officer Bart Turek.

According to Atwater, Turek approached Atwater's car and yelled and stuck his finger in her face, yelling, "We've

met before!" and "You're going to jail!" Atwater then calmly asked Turek not to yell. Turek had, in fact, pulled over Atwater previously for failing to fasten her children in seat belts. Turek next allegedly called for back up and asked Atwater to see her driver's license and insurance information. Atwater responded that her license and insurance information were unavailable because they were in her purse, which had been stolen the day before. Turek laughed and told her he had heard that story "two hundred times."

Atwater further alleges this behavior frightened her children, who were upset and crying. Atwater asked Turek if she could take her children to her friend's house, which was approximately two houses from the location at which Turek stopped Atwater. Turek responded that Atwater was "not going anywhere" and that Atwater did not care about her children or else she "would have had them in seat belts."

After Atwater's friend came to the car and took Atwater's children to her house for safe keeping, Turek continued to "yell at" and "browbeat" Atwater, telling her she was going to jail. Turek then handcuffed Atwater and took her to jail, where she spent approximately one hour. Atwater's pickup truck was towed and impounded. The arrest report states Atwater was arrested for driving without her seat belt fastened, failing to fasten her children in seat belts, driving without a license, and failing to provide proof of insurance. Atwater offers no evidence that these asserted reasons are pretextual or that there is any other reason she was arrested.

Atwater asserts Turek did not inform her that she was under arrest, and he did not inform her of her *Miranda* rights. There is no evidence that Turek interrogated Atwater, either,

however. Furthermore, Atwater concedes that she and her children were not physically harmed in any way during the incident, either at the time of the stop, at the time of the handcuffing, during transportation to the jail, or during her stay at the jail. Atwater alleges she was cold while she was the in jail cell, but she admits that she did not inform anyone that she felt cold.[1]

Under Texas law, it is a misdemeanor for an adult to ride in the front seat of a motor vehicle without a seat belt, TEX. TRANSP. CODE ANN. § 545.413(a), and it is also a misdemeanor to permit a child under the age of fifteen years to ride in the front seat of a motor vehicle without a seat belt, *id.* § 545.413(b). A peace officer "may arrest without warrant a person found committing" either of these seat belt offenses.

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[1] "Cold" also describes how the undersigned felt while examining the plaintiffs' response to the defendants' motion for summary judgment, with which the plaintiffs offered Exhibit A, a one-inch thick copy of the entire regulations, policy, and procedure of the Lago Vista Police Department, without any indication of which portions of the policy were relevant. The plaintiffs offered no summary judgment evidence to support their factual allegations, and plaintiffs' counsel relied solely on the summary judgment evidence offered by the defendants. The undersigned was also chilled by the defendants' submission of complete condensed deposition as an exhibit to the summary judgment evidence and citation to another multipage exhibit without any hints on where to look. With the busy case load this and most courts encounter, it would be much more considerate of both parties to attach and cite to only the relevant pages (in normal-sized print rather than microscopic).

Id. § 543.001. Furthermore, it is a misdemeanor to fail to display a valid driver's license when requested to do so by a peace officer, *id.* § 521.025. Finally, a driver who cannot exhibit proof of financial responsibility is presumed to have committed a misdemeanor for violation of the motor vehicle liability insurance requirement. *See id.*§§ 601.051, 601.053, 601.191.

The plaintiffs nevertheless filed suit August 8, 1997 in the 98th Judicial District of Travis County, Texas, and the defendants properly removed the case to this Court on September 12, 1997. The named plaintiffs in the case are Atwater and her husband, Michael Haas, as next friend of their children, Anya and Mackinley. The plaintiffs also make class action allegations, but they have waived any class action because they did not file a motion requesting class certification within thirty days as required by Local Rule CV-23.[2] The plaintiffs sue Bart Turek, Police Chief Frank Miller, and the

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[2] The class action allegations were frivolous because the alleged claims of deprivations of constitutional rights would not satisfy the typicality or commonality prerequisites. Similarly, the class members' causes of action could not conceivably satisfy the "common questions of law or fact predominating" requirement. *See* FED. R. CIV. P. 23; TEX R. CIV. P. 42. Even if 500 citizens of Lago Vista were injured because of the same unconstitutional policy of the City, it is inconceivable that the qualified immunity evaluations and the damage calculations for each of the class members would be the same or even similar. In short, it is inconceivable as a matter of common sense and as a matter of law that the claims asserted could possibly be amenable to a class action.

City of Lago Vista. The plaintiffs allege causes of action for (1) Deprivation of Constitutional Rights, (2) Excessive Use of Force, (3) False Imprisonment, (4) Inadequate Training, (5) Failure to Supervise, (6) Intentional Infliction of Emotional Distress, (7) Assault and Battery, (8) Grossly Negligent Hiring and Retention, (9) Conspiracy to Formulate and Enforce a Municipal Policy to Violate Constitutional Rights, and (10) Common Fund.

The defendants have filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim, or in the alternative, for summary judgment. The plaintiffs have responded to the motion for summary judgment, but have not offered one iota of summary judgment evidence. As a result, there is no evidence whatsoever that would overcome qualified immunity on the constitutional claims and statutory immunity on the state-law claims.

II. Constitutional Claims

Qualified immunity shields state officials from suit for damages provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Anderson v. Creighton,* 107 S. Ct. 3034 (1987); *Harlow v. Fitzgerald,* 102 S. Ct. 2727 (1982). To determine whether the defendants are entitled to qualified immunity, the Court must engage in a two-part inquiry. First, the Court must determine whether the plaintiff has alleged a violation of a clearly established constitutional or statutory right. *See Ganther v. Ingle,* 75 F.3d 207, 210 (5th Cir.1996). If the law is clearly established, then the Court must decide whether the defendants' conduct was objectively reasonable in light of that law. *See id.* "The

contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 107 S. Ct. at 3038-39.

The plaintiffs have failed to offer summary judgment evidence that could support either prong of the qualified immunity test. First, they have not provided evidence of any violation of a constitutional right, much less a violation of a clearly established constitutional right. Second, there is no evidence that any defendant acted in a manner that was not objectively reasonable in light of existing constitutional law.

The Court will not separately consider the plaintiffs' claim for an independent cause of action for "deprivation of constitutional rights." This cause of action clearly fails to state a claim because it does not allege with any particularity what conduct violated what provision of the Constitution. The plaintiffs allege specific constitutional violations in their causes of action for excessive force, false imprisonment, inadequate training, and failure to supervise.

The only alleged "force" and "imprisonment" arose out of Turek's arrest of Atwater for the seat belt violations as clearly authorized by Texas law. Atwater admits she violated the law,[3] and she does not allege that she was harmed or

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[3] Atwater is barred from bringing any claims related to her conviction unless she can prove "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey,* 114 S. Ct. 2364,

detained in any way inconsistent with the law. She alleges she was cold in her cell at the jail, but she does not allege that she informed anyone she was cold. There is no clearly established constitutional right to have the thermostat magically set at the right temperature for each detainee, and there are no allegations that anyone acted in any sort of unreasonable manner because Atwater did not even voice her complaint.

The plaintiffs note the irony that Atwater was not placed in a seat belt when she was placed in the squad car in handcuffs. This may be ironic, but it was not illegal because the law only requires fastened seat belts in the front seat; and it was clearly not unconstitutional because the plaintiff was in no way harmed by the situation.[4] In fact, had Turek placed Atwater in the car and placed a seat belt gingerly around her, plaintiffs' counsel would have undoubtedly added allegations of "excessive force" and "false imprisonment" for the brutal manner in which Atwater would have been handcuffed and restrained, immobile in the squad car, by the officer. Overall, it is unimaginable how any competent attorney could think the summary judgment record establishes any section 1983 claim for excessive force or false imprisonment.[5]

2372, (1994)

[4] The plaintiffs point out that this lack of a seat belt violated the Lago Vista Police Department's written policy, but that is merely a violation of police policy, not a violation of the Constitution or laws of the United States, as required for a violation of section 1983.

[5] It is disturbing that the plaintiffs' counsel blatantly mischaracterizes the case law of unconstitutional searches to

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suggest Turek's conduct was unconstitutional. First, the plaintiffs cite a case and argue it is on point because it deals with police conduct in "arresting and briefly detaining" a tourist who made an illegal left turn and failed to produce his license. Plaintiffs' Cross-Motion for Partial Summary Judgment and Response to City of Lago Vista Defendants' Motion to Dismiss or in the Alternative for Summary Judgment [#31], at 13 (citing *Kelly v. Foti*, 77 F. 3d 819, 821-22 (5th Cir. 1996)). The plaintiffs leave out the minor detail that the holding was based on the fact that the innocuous tourist in *Kelly* was then subject to strip searches and body cavity searches. The case is as similar to Atwater's as scotch whiskey is to apple juice:

> A New Orleans police officer stopped Kelly, a tourist in town for a convention, for making an illegal left turn. Kelly explained that she inadvertently had left her diver's license at her hotel, and the officer called for backup to administer a DWI test, which Kelly passed. The police brought Kelly to a holding facility after arresting her for making the illegal turn and driving without a license. Kelly called her sister in Baton Rouge and husband in Connecticut and asked them to post bond, but they failed to do so promptly. After Kelly had been at the holding facility between four and five hours, police shackled and handcuffed her and took her to a female detention facility, where they subjected her to a strip search and cavity search. The police ordered Kelly to strip, turn around, bend over, spread her buttocks, and cough. After Kelly dressed, police escorted her to another room, where they told her to strip again and sprayed

The claims against the City of Lago Vista and Chief Miller for inadequate training, negligent hiring and retention, and failure to supervise as constitutional violations hinge on the requirement that the alleged inadequate training and failure to supervise caused some constitutional violation committed by Turek. As discussed above, there is no evidence in the record that Turek infringed any constitutional rights through the use of excessive force, false imprisonment, or "deprivation of constitutional rights." Therefore, these derivative causes of action necessarily fail, as well.

Furthermore, the plaintiffs' allegations of a conspiracy to formulate and enforce a municipal policy to violate

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> disinfectant on her crotch, breasts, and head. They then took Kelly to a shower area, where she showered in view of other inmates, before locking her in a cell. Kelly's family bonded her out approximately eleven hours after the arrest.

Id. at 820. Contrary to the plaintiffs' representations, there is quite a difference between this humiliating series of strip searches and "arresting and briefly detaining."

Similarly, the plaintiffs cite dicta from *Watt v. City of Richardson Police Dep't*, 849 F.2d 195 (5th Cir. 1988), for the proposition that it was not even necessary to place Atwater in a cell following her arrest. The holding in *Watt*, however, also related to an illegal strip and visual body cavity search. *Id.* at 199. Therefore, *Watt* and *Kelly* are inapposite.

constitutional rights fails on several grounds. The elements of a conspiracy under section 1985(3), which is the only conceivable civil rights conspiracy the plaintiffs allege, are

> (1) a conspiracy of two or more persons; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Word of Faith Outreach Ctr. Church, Inc. v. Sawyer, 90 F.3d 118, 124 (5th Cir. 1996) (citing *Deubert v. Gulf Fed. Sav. Bank,* 820 F.2d 754, 757 (5th Cir. 1987)). Furthermore, it is essential that such a claim "that the conspiracy be motivated by racial animus." *Id.* In this case, there are no allegations of animus, so the claim fails on that ground alone. But the plaintiffs have not even alleged a "conspiracy" because the parties allegedly involved in the conspiracy are all agents of the City of Lago Vista Police Department and therefore unable to conspire under the intracorporate conspiracy doctrine. *See Hilliard v. Ferguson,* 30 F.3d 649, 653 (5th Cir. 1994); *Thompson v. City of Galveston,* 979 F. Supp. 504, 511 (S.D. Tex. 1997). Finally, as discussed above, no person was injured or deprived of any constitutional right as a result of the allegations. In short, the constitutional conspiracy claim fails miserably.

Additionally, suits against the public officials in their official capacities are treated as claims against the

governmental entities the public officials represent. *See Kentucky v. Graham,* 105 S. Ct. 3099, 3105 (1985); *Baker v. Putnal,* 75 F.3d 190, 195 (5th Cir. 1996). Therefore, the Court treats the claims against Turek and Miller in their official capacities as claims against the City of Lago Vista. Section 1983 liability of a municipality "may not be imposed on a theory of respondeat superior for the actions of government employees." *See Johnson v. Moore,* 958 F.2d 92, 93 (5th Cir. 1992). "Local governing bodies may be liable under section 1983, however, where the alleged unconstitutional activity is inflicted pursuant to official policy." *Id.* The one thing the plaintiffs have proven in this case is a "policy or custom," but they have put the cart before the horse because they have failed to offer evidence of any unconstitutional activity, as discussed above.

III. State-Law Claims

Under the Texas Tort Claims Act, a governmental unit is protected by sovereign immunity from suit based on any torts unless the torts arise out of the operation of motor vehicles or the use of tangible personal property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. In light of established Texas law, it is laughable to suggest that any of the alleged torts against Atwater arose out of the operation of Tureks's squad car, his handcuffs, his badge, his lucky four-leaf clover, or any other imaginable tangible property. *See DeLeaux v. Hamshire-Fannett Indep. Sch. Dist.,* 835 S.W.2d 49, 51 (Tex. 1992) (motor vehicle); *Kerrville State Hosp. v. Clark,* 923 S.W.2d 582, 585-86 (Tex. 1996) (tangible property); *Smith v. Tarrant County,* 946 S.W.2d 496, 501 (Tex. App.-Ft. Worth, writ requested) (tangible property). Furthermore, the protection of sovereign immunity extends to intentional torts

such as assault and battery and intentional infliction of emotional distress. TEX. CIV. PRAC. & REM. CODE ANN. § 101.057; *Gillum v. City of Kerrville,* 3 F.3d 117 (5th Cir. 1993). Therefore, the claims for intentional infliction of emotional distress, assault and battery, and grossly negligent hiring and retention are barred by sovereign immunity.

Needless to say, since the plaintiffs have not offered summary judgment evidence to support any of their causes of action and have waived their class action allegations, their "common fund" cause of action must be dismissed.

IV. Conclusion

This is a lawsuit that should have never been filed and was poorly litigated once it was. Suits such as this are bane of the American legal system.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that the Defendants' Rule 12(b)(6) Motion for Summary Judgment [#19] is GRANTED;

IT IS FURTHER ORDERED that Plaintiffs' Objections to and Motion to Strike Portions of the Affidavit of Frank Miller [#28] are OVERRULED;

IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion for Partial Summary Judgment [#31] is DENIED;

IT IS FURTHER ORDERED that Gail Atwater and Michael Haas as next friend for Anya Haas and Mackinley

Haas TAKE NOTHING against the City of Lago Vista, Bart Turek, and Frank Miller;

IT IS FURTHER ORDERED that all costs shall be TAXED to the plaintiffs, for which let execution lie; and

IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT.

SIGNED on this the 12th day of February 1998.

/s/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

(5)

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No. 99-1408

IN THE

Supreme Court of the United States

GAIL ATWATER, *et al.*,

Petitioners,

v.

CITY OF LAGO VISTA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Respondents, City of Lago Vista, former Lago Vista Officer Bart Turek, and Police Chief Frank Miller, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Gail Atwater, and Michael Haas as next friend of Anya Savannah Haas and Mackinley Xavier Haas. Petitioners seek review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, rendered on November 24, 1999. Petitioners' request for writ should be denied.

STATEMENT OF THE CASE

I. Statement of Facts.

On March 26, 1997, former Lago Vista Police Officer Turek observed a Dodge pickup truck in which neither the adult driver or the two young children were wearing seatbelts. One of the children was standing on the passenger seat in the truck. In accordance with the Texas law, Officer Turek arrested Petitioner Atwater for failing to wear a seatbelt, failing to seatbelt her children, failure to show proof of financial responsibility and failure to display her driver's license. It is undisputed that she committed each of these offenses. It is undisputed that Texas law authorized Petitioner Atwater's custodial arrest.

Petitioner Atwater was transported to the Lago Vista Police Department, where she waited about fifty minutes for the Magistrate. It is undisputed that no physical force or threats of physical force were used against Petitioner Atwater at any time during this incident. The Magistrate read Petitioner Atwater her rights, and she was released after posting bond.

It is undisputed that Officer Turek had probable cause to believe that Petitioner Atwater committed five criminal offenses. Petitioner Atwater's arrest was effected in a public place, and without the use of excessive physical force. She was subjected to ordinary booking procedures, and was released within an hour.

II. The Proceedings Below.

On August 8, 1997, Petitioners commenced an action against Respondents in the 98th Judicial District Court of Travis County, Texas, alleging a multitude of constitutional and State law claims. Respondents properly removed the litigation to the United States District Court for the Western District of Texas at Austin.

On February 13, 1998, the District Court granted Respondent's Summary Judgment Motion, wholly dismissing Respondents' claims. Petitioners filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, and a three-judge panel issued their opinion on January 29, 1999.

The Panel reversed summary judgment in favor of Officer Turek and the City of Lago Vista on Petitioners' Fourth Amendment unreasonable seizure claim, and remanded that issue to District Court. The Panel upheld summary judgment in favor of Respondents on all other constitutional and state law claims. Summary judgment was affirmed in favor of Police Chief Miller on all grounds.

The Fifth Circuit granted rehearing *en banc*, and vacated the panel's decision. After briefing and oral argument, ten

appellate justices held that Petitioner Atwater's custodial arrest did not violate her Fourth Amendment rights, and affirmed the District Court's summary judgment.

REASONS FOR DENYING WRIT

Petitioners ask this Court to grant a Writ of Certiorari in order to determine if the Fourth Amendment limits the use of custodial arrests for fine-only traffic offenses. However, this question has already been resolved by the United States Supreme Court. All custodial arrests, including those for fine-only traffic offenses, must be reasonable. An arrest is reasonable if the officer had probable cause to arrest.

It is undisputed that Officer Turek had probable cause to arrest Petitioner Atwater. The arrest, therefore, complied with the requirements of the Fourth Amendment. The holding of the United States Court of Appeals for the Fifth Circuit recognized and considered Fourth Amendment limits on Petitioner Atwater's arrest. Thus, the Fourth Amendment question presented by Petitioners does not merit additional review.

Petitioners argue that the arrest was unreasonable and violated the Fourth Amendment. They demand additional restrictions, beyond probable cause, to justify an arrest for a fine-only traffic offense. Only in "extraordinary circumstances" has the United States Supreme Court imposed a heightened standard for reviewing an arrest. Those circumstances are not present here. Further, the United States Supreme Court, and the federal Courts of Appeals, have rejected all attempts to create a probable cause "plus" standard for ordinary arrests. The Fifth Circuit opinion is consistent with all previous case law, and correctly states

the law. Petitioner Atwater's custodial arrest complied with the Fourth Amendment. As a result, the Petition for Writ of Certiorari should be denied.

I. THE FOURTH AMENDMENT CONTROLS ALL ARRESTS

The "Question Presented" in the Petition for Writ of Certiorari controls the issue raised for review by the United States Supreme Court. Petitioners ask this Court to determine if custodial arrests are limited by the Fourth Amendment for fine-only traffic offenses. There is no dispute that the Fourth Amendment limits the use of custodial arrests for all offenses, including fine-only traffic offenses.

The Constitution requires that all arrests be reasonable. U.S. CONST. Amendment IV. An arrest is reasonable if it is made with probable cause. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979).

The United States Court of Appeals for the Fifth Circuit found that Petitioner Atwater's arrest complied with the Fourth Amendment limitations. The arrest was constitutional, because it was made with probable cause. If the Court answers Petitioners' question in the affirmative, the Fifth Circuit's holding still stands. As a result, the question presented by Petitioners does not merit United States Supreme Court review.

II. FIFTH CIRCUIT OPINION IS CONSISTENT WITH THIS COURT'S OPINIONS

The Fourth Amendment requires that all arrests be reasonable. Petitioners argue that the Fifth Circuit erred by failing to require more than probable cause in order to determine the reasonableness of her arrest. The Fifth Circuit required probable cause for an ordinary arrest. This is consistent with this Court's requirements.

A. An Arrest is Reasonable if It is Made with Probable Cause.

In its history of evaluating arrests, the United States Supreme Court has recognized that probable cause justifies the arrest and ordinary processing of the suspected offender. *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

> Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.

Id. The probable cause test accommodates an individual's right to liberty and the State's duty to control crime. *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Gerstein*, 420 U.S. at 112. Probable cause is the measure of a reasonable arrest under ordinary circumstances.

Officer Turek had probable cause to believe that Petitioner Atwater committed five criminal offenses.[1] She failed to seatbelt herself, or her two young children. She failed to carry with her proof of insurance or her driver's license. Her arrest was effected in a public place, with probable cause, and without the use of excessive physical force. She was subjected to ordinary booking procedures, and was released within an hour. Petitioner Atwater pled guilty to all of the seatbelt charges. The driver's license and insurance charges were dropped when she produced proof of the documents.

Petitioners do not dispute the probable cause facts. Probable cause authorized Officer Turek to arrest Petitioner Atwater, and to temporarily detain her until she was taken before a magistrate. Officer Turek did not violate Petitioner Atwater's Fourth Amendment rights. As a result, this Petition should be denied.

B. Consideration of Additional Factors, Only Under Extraordinary Circumstances.

Petitioners argue that the Fifth Circuit erred in failing to consider extra factors, other than probable cause, to determine if the arrest was reasonable. This Court has already rejected consideration of additional restrictions when evaluating the reasonableness of the ordinary arrest. *Whren v. United States*, 517 U.S. 806, 813 (1996) (refusing to take into account the subjective intent of the officer or whether

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1. Appellant violated TEXAS TRANSPORTATION CODE ANN., §§ 545.413(a), 545.413(b), 521.025, and 601.051, 601.053 and 601.191.

other officers would have made the arrest, in determining if an arrest is reasonable).

There are only three "extraordinary" circumstances where arrests made with probable cause required further evaluation by this Court. *See, id.* at 818; *Robinson*, 414 U.S. at 325. These "extraordinary" circumstances involve arrests that are either: *1)* made in a home; *2)* involve excessive physical force in effecting the arrest; or *3)* go beyond ordinary booking procedures to effect a physical invasion of the arrestee's bodily integrity. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless entry into home); *Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force); *Winston v. Lee*, 470 U.S. 753 (1985) (surgical removal of a bullet). It is undisputed that these "extraordinary" circumstances do not apply to the case at bar.

Consistent with this Court's rulings, the Fifth Circuit correctly decided that Petitioner Atwater's arrest and short detention did not violate her Fourth Amendment rights. As a result, the Petition for Review should be denied.

C. *Knowles v. Iowa* does not conflict with the Fifth Circuit opinion.

In 1999, this Court held that an officer may not perform a full search of an automobile after the officer has issued the driver a citation. *Knowles v. Iowa*, 525 U.S. 113 (1999). Petitioner complains that the Fifth Circuit opinion "eviscerates" the *Knowles* opinion. However, this complaint is unfounded.

Iowa state law authorized officers to either issue a citation, or to take traffic offenders into custody. In *Knowles*,

the Iowa Supreme Court upheld the constitutionality of an officer issuing a citation and still performing a custodial arrest-type searches of the driver and automobile. *Knowles*, 569 N.W.2d 601 (Iowa 1997). The United States Supreme Court reversed the Iowa Supreme Court. It is unconstitutional to perform a custodial arrest-type search if the driver is not subjected to a custodial arrest. *Knowles*, 525 U.S. at 487-88.

Knowles is a search case, holding that police officers must actually arrest the driver in order to perform a post-arrest search. The *Knowles* Court neither addressed nor attempted to restrict the authority of police officers to effect the custodial arrest of traffic offenders. In the instant case, the Fifth Circuit opinion does not address the same issues. It does not conflict with the *Knowles* decision, or with any other holding from this Court.

III. FIFTH CIRCUIT OPINION IS CONSISTENT WITH OPINIONS OF STATE AND FEDERAL COURTS

The United States Supreme Court never required more than probable cause to establish the constitutionality of a public arrest. *Whren*, 517 U.S. at 813. The precedent from other federal and state courts is consistent with this approach. Every Court addressing the question upheld the federal constitutionality of public custodial arrests made with probable cause and in compliance with state law. These Courts refused to impose additional limitations on the right to publicly arrest certain criminal offenders.

A. Consistency Among the Federal Courts of Appeal.

Federal Courts of Appeal uniformly reject all attempts to require more than probable cause in determining whether

an ordinary arrest constitutes a civil rights violation. These Courts declined to consider (a) how serious the offense or punishment was;[2] (b) whether a citation could have been issued in lieu of an arrest;[3] (c) whether state law was complied with;[4] (d) the subjective intent of the officer making the arrest;[5] (e) whether other officers would have made the

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2. *Ricci v. Arlington Heights*, 116 F.3d 288, 290-91 (7th Cir. 1997), *cert. dism'd*, 523 U.S. 613 (1998); *Fisher v. WMATA*, 690 F.2d 1133, 1139 (4th Cir. 1982).

3. *Moore v. Gwinnett County*, 967 F.2d 1495 (11th Cir. 1992) *cert. den.* 506 U.S. 1081 (1993); *Higbee v. City of San Diego*, 911 F.2d 377, 379 (9th Cir. 1990).

4. *See Fields v. City of South Houston*, 922 F.2d 1183 (5th Cir. 1991); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir. 1997); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Barry v. Fowler*, 902 F.2d 770, 772-73 (9th Cir. 1990); *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir. 1974). In each of these cases, the court concluded that probable cause justified the warrantless arrests, despite the violation of state laws and early common law that restricted the arrest of misdemeanor offenders to only offenses that were committed in the officer's presence.

Petitioner's reliance on *United States v. Mota* (982 F.2d 1384 [9th Cir. 1993]) for the contrary position is misplaced. In *Mota*, the Court addresses the admissibility of evidence in a criminal trial. The Court explicitly distinguished its holding from claims involving civil rights (such as its holding in *Barry v. Fowler*, *supra*). *Id.* at 1387. In the context of a § 1983 claim, the Ninth Circuit does not consider a violation of state law as relevant to determining if a civil rights violation occurred. *Id.*

5. *Holland v. City of Portland*, 102 F.3d 6 (1st Cir. 1996); *United States v. Basey*, 816 F.2d 980, 990-91 (5th Cir. 1987).

arrest;[6] or (f) if the arrest complied with usual police department policies or practices.[7]

In each of these cases, probable cause alone was sufficient to establish the reasonableness of the arrest. These federal appellate opinions are consistent with the opinion rendered by the Fifth Circuit in this matter. There is no confusion among the federal courts that justifies Supreme Court intervention.

B. Consistency Among the State Courts.

State courts have addressed a number of issues related to the custodial arrest of traffic offenders. However, none of these opinions control the question presented or argued by the Petitioners. Petitioners fail to cite even one case, on the federal or state level, holding that the United States Constitution requires more than probable cause to effect the public, state-authorized arrest of a misdemeanor offender. As a result, Supreme Court intervention in this matter is not necessary to resolve conflict or inconsistencies.

State courts uphold the custodial arrests of fine-only misdemeanor offenders. *See, e.g., Illinois v. Ramirez*, 618 N.E.2d 638 (Ill. App. – 1st Dist. 1993). These courts consider whether a violation of state law should effect the

6. *Whren*, 517 U.S. at 813-4; *Moore v. Gwinnett County*, 967 F.2d 1495, 1498 (11th Cir. 1992), *cert. den.*, 506 U.S. 1081 (1993).

7. *United States of America v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), *cert. den.*, 502 U.S. 963 (1991).

constitutionality of the arrest[8]; and whether arrest for civil infractions is authorized.[9]

For instance, the Washington Supreme Court found that state public policy dictated that the custodial arrest of certain misdemeanor offenders was inappropriate. *Washington v. Hehman*, 578 P.2d 527, 529 (Wash. 1978). The Court explicitly acknowledged that the United States Supreme Court never required such a holding. It noted that states were entitled to provide criminal defendants greater rights than the minimum standard required by the Constitution. *Id.*

State court decisions reflect the diversity with which various states establish and enforce their laws. It is uniquely within these bodies' power and authority to establish laws and dictate the mode of their enforcement and punishment. Contrary to Petitioners' assertion, these opinions do not reflect "confusion" in the lower courts about the constitutional standard. Rather they reflect differing approaches to enforcement of their state's laws. The federal constitutional standard for a public arrest that is made in compliance with state law is not questioned by these Courts; probable cause is enough.

8. *See, e.g., Thomas v. State*, 614 So.2d 468, 471 (Fla. 1993).

9. *See, e.g., Barnett v. United States*, 525 A.2d 197, 198-99 (D.C. 1987) (noting that the arrest would only be justified if complainant committed a criminal infraction, as opposed to a civil one).

IV. FIFTH CIRCUIT OPINION IS CONSISTENT WITH EARLY AMERICAN JURISPRUDENCE

Petitioners claim that the common law dictates a different result in this matter. Petitioners note that, in England, common law provided that an officer only had authority to arrest for misdemeanors that constituted a breach of peace, and were committed in their presence. As noted by the Fifth Circuit, Petitioners waived this claim, by failing to raise it until this case was reheard by that Court *en banc*. Morever, the Fifth Circuit's holding is consistent with early American jurisprudence authorizing arrests for all misdemeanors committed in the officer's presence.

A. Breach of Peace Claim was Waived.

It is a well-recognized appellate principle that issues or questions that are not raised to the trial court, are not considered in the reviewing court. *See, e.g., Becker Steel Co. v. Cummings*, 296 U.S. 74, 82 (1935); *Stealgald v. United States*, 451 U.S. 204, 208 (1981). Petitioners argue that the Fifth Circuit erred by failed to consider that Petitioner Atwater's offenses did not constitute breaches of the peace. Petitioners did not raise this common law argument in their pleadings, Summary Judgment Response, or Motion for Rehearing that was presented to the trial court. It was not raised in the Appellate Brief, or in Reply to Appellee's Brief. It is first relied on by Petitioners in the Appellants' Brief filed before Fifth Circuit *en banc* consideration of this matter. Petitioners want this Court to review a question on grounds that the trial court was not given an opportunity to consider, Petitioners waived their complaint.

B. Early American Jurisprudence is Consistent.

Common law does not dictate a different result in this matter. Old English common law allowed officers to arrest offenders committing misdemeanors if the offense constituted a breach of the peace, and was committed in their presence. However, the English and American legislatures have modified this limitation for over one hundred years. *See, e.g., Burroughs v. Eastman*, 59 N.W. 817, 818-820 (Mich. 1894), and cases cited therein. This 1894 court in *Burroughs* cites numerous courts that already approved of legislation authorizing police power to arrest on view for offenses that did not necessarily constitute a breach of the peace.

Moreover, this Old English arrest requirement is ignored in previous Supreme Court decisions as a probable cause standard for public arrests. *See, e.g., Carroll v. United States*, 267 U.S. 132, 156-57 (1925); *United States v. Watson*, 423 U.S. 411, 418 (1976). In 1976, the United States Supreme Court relied upon the proposed Model Code of Pre-Arraignment Procedure. The Code permitted warrantless arrests when misdemeanors were committed in the officer's presence, regardless of whether the offense constituted a breach of the peace. § 120.1, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE.[10]

Early American jurisprudence has long accepted the legislature's power to modify the old English common law arrest limitations. Moreover, Petitioner waived this common law argument by failing to raise it in a timely manner. As a result, the Fifth Circuit correctly sustained summary judgment, and the Petition should be denied.

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10. *See also*, 18 U.S.C.A. § 3052 (since 1951, giving F.B.I. agents authority to arrest for any offense against the United States committed in their presence).

CONCLUSION

Petitioner Atwater committed five violations of Texas law. In accordance with his authority, Respondent/Officer Turek arrested Petitioner Atwater, and briefly detained her until she was released by a magistrate. The Fifth Circuit correctly held that Petitioner Atwater's Fourth Amendment rights were not violated by this arrest.

Review on a writ of certiorari is a matter of this Court's judicial discretion. The Fourth Amendment question presented does not reflect a vital question that justifies this Court's review. Obviously, the Fourth Amendments limits the use of custodial arrests for fine-only traffic offenses, as it does for all offenses. This Court has long recognized that the existence of probable cause ensures that the State's interest in effecting the arrest is balanced by the individual's right of liberty. The Fifth Circuit's opinion is consistent with this Court's holdings regarding the same.

Moreover, the Fifth Circuit opinion does not conflict with the decisions of other United States Courts of Appeals, or that of the state courts. In fact, Petitioners fail to cite even one Court that required more than probable cause to determine the constitutionality of an ordinary, public arrest of a misdemeanor offender. Further, early American jurisprudence has long recognized that the common law breach of peace requirement could be abrogated by legislative action.

An officer's right to arrest when there is probable cause is clearly established by this Court, and the lower courts. The Fifth Circuit opinion is consistent with these decisions, and the Question Presented does not merit further review. As a result, the Petition for Writ of Certiorari should be denied.

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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF TEXAS, INC., IN SUPPORT OF PETITIONERS' PETITION FOR DISCRETIONARY REVIEW

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

ACLU of Texas, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the ACLU of Texas, Inc. in this case arises from the fact that, in addition to our institutional concern with the Court's interpretation of fundamental liberties, many of our clients and those simply making inquiries about possible civil rights violations have reported similar instances to the facts in this case. The resolution of this case will have a direct impact on the people we seek to serve.

The *amicus curiae* is requesting to file a brief that will discuss the broader policy implications of allowing the current ruling of the Court of Appeals to stand and to draw the court's attention to general facts beyond the instant case.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union of Texas (ACLU-TX) is a non-profit membership organization incorporated in the State of Texas with approximately 8,000 members. It is affiliated with the American Civil Liberties Union headquartered in New York, NY and through the national organization with 53 other ACLU affiliates in the United States with a total membership of 275,000 members. The ACLU-TX is a membership organization with a 501(c)(4) tax status. Membership dues to the ACLU are not tax exempt. It is affiliated with the ACLU Foundation of Texas (Foundation) which is a tax exempt 501(c)(3) organization.

The ACLU-TX is dedicated to defending the principles of liberty and equality embodied in the Bill of Rights. The ACLU-TX provides legal services through cooperating attorneys acting on a pro bono basis to persons whose liberties have been violated, as well as educating the public on matters involving civil liberties and civil rights. The ACLU-TX is primarily involved in "impact" litigation to correct systemic violations of civil liberties.

The ACLU-TX has specific and direct interest in this litigation not only on behalf of its membership but also on behalf of the significant number of people who seek ACLU assistance involving situations that present facts not unlike the instant case. In the course of a year the

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[1] This brief is made upon motion. Pursuant to Rule 37.6 counsel for amicus state that no counsel for a party authored this brief in whole or in part and no person other than amicus made a monetary contribution to the preparation or submission of this brief.

ACLU-TX receives nearly 6,000 requests for assistance, a significant portion of which involve questions of alleged police misconduct. The interest of the people that the ACLU-TX represents and counsels is directly and adversely affected by the decision below.

SUMMARY OF ARGUMENT

The common thread of American political theory is that government is, or ought to be, limited and restrained from unreasonably imposing restraints upon its citizens' liberties. The entire body of law relating to individual liberties seeks to find the balance between what is necessary for the proper functioning of society and the maximum freedom possible for the individual.

This notion is tested daily in applying the Fourth Amendment's prohibition against unreasonable seizures of person or property. That government necessarily must sometimes intrude on our lives does not mean that we grant carte blanche approval of unreasonable actions. We have traditionally given the greatest weight to protecting public and private intrusions into the home under the general "right to be left alone." But that right extends, albeit to a lesser degree, beyond the portals of the home. Unreasonable and unjustified detention of the person by police violates this basic right.

The Fourth Amendment frees us from unreasonable searches and seizures. It should be our protection from abusive and harassing governmental conduct. It ought to shield a woman driving with two small children from fear that a minor traffic infraction will result in her being

booked as a criminal and confined in jail until she can be presented to a magistrate.

That police feel free to behave the way Officer Turek did in the instant case is the result of police everywhere believing that this Court sanctions such practices. The line of cases that permit searches incident to an arrest for a minor traffic infraction has led both the police and the majority of the Fifth Circuit to believe that it is acceptable for the police to treat a minor traffic offense as a more serious crime depending upon the whim of the arresting officer.

Because the answer to the question of whether or not the police can incarcerate a person for a minor infraction is critical to every person in this country, this Court should grant certiorari.

ARGUMENT

I. The facts of this case involve such an important Constitutional question of overarching national significance that the Court should grant certiorari to set national standards.

Without question, the most significant and frequent contact the average American has with the police is being stopped for a traffic infraction. It would be difficult to find anyone, other than a neophyte driver, who has not been stopped and given a citation for some traffic offense. The ramifications of the ruling in this case will be felt by millions of people in their ordinary daily life. If allowed to stand, the ruling below signals an open season on

motorists and others who, for whatever reason, displease a police officer.

A. It is unreasonable to permit police to put someone in jail pending a hearing for an offense for which no jail time can be imposed.

We require police to articulate reasons giving rise to probable cause prior to making an arrest or conducting a warrantless search. These decisions are subject to review by a judicial officer. We require a magistrate to have reasons rising to probable cause before issuing a search or arrest warrant, and the law is well-settled that the issuing magistrate may not simply rubber stamp the decision of the police. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964). If we were not concerned that an overzealous officer might abuse his office, the law would be otherwise. It is a reasonable and proper concern.

How is it, then, that the law can allow a police officer to determine that a person should go to jail when the law allows neither judge nor jury, under any circumstances, to incarcerate that person? To be sure, the magistrate will release a person so detained. There is simply no other option. But that does not lessen the humiliation of being handcuffed, fingerprinted, and photographed, and spending as much as two days in jail. Nor will the magistrate's release make up for lost work or a lost holiday.

In the case before the Court, Ms. Atwater was, in some respects, fortunate. She was near enough to her home that a neighbor saw what was happening and was able to take her terrified children for her. She was also fortunate to only spend an hour in jail. Circumstances

could easily have been different. She could have been traveling across country with no friendly neighbor in sight. In many small towns across this state, she may have languished up to forty-eight hours in jail before being released by a magistrate.

This Court has often written about the "right to be left alone" in the context of the privacy of one's own home. *FCC v. Pacifica*, 438 U.S. 726, 748 (1978); *Telecommunications Consortium v. FCC*, 518 U.S. 727, 804 (1996); *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 77 (1983) (Rehnquist, O'Connor concurring); *Carey v. Brown*, 447 U.S. 455, 477 (1980) (Rehnquist dissenting, joined by Chief Justice and Blackmun). These cases accord great weight to the privacy of the home as a place free from unwanted intrusion. To be sure, the home is to be accorded the highest weight. But is it the only place where one has a right to be left alone?

No one would argue that a person guilty of a traffic infraction has a "right to be left alone" by a police officer. This justified intrusion should not give rise to the physical incapacitation and detention of a person. Surely, in a free and just society, one has the right to expect one will not be imprisoned simply because a tail light is out or a seatbelt was not buckled.

It is reasonable to expect to be left alone by police when one's conduct comports with the law. But even when a person's conduct does give rise to a police stop, it is reasonable to expect the officer will not be allowed to incarcerate that person for an offense that does not permit incarceration.

B. The purpose of the Fourth Amendment is to protect all people from unreasonable police behavior and free them from abuse and the fear of abuse.

The expansion of the automobile exception to the Fourth Amendment is well documented in the *amicus* brief of the Texas Criminal Defense Lawyers' Association. "The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule." *Ker v. California*, 374 U.S. 23, 61 (1963) (Brennan, separate opinion joined by The Chief Justice, Douglas, and Goldberg).

The blessings of liberty we enjoy, including freedom from arbitrary and obtrusive governmental action, is due to a vigilant judiciary jealously protective of our fundamental freedoms. As was noted by Justice Harlan;

> Though the preceding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and affects their substantial purpose. It may be said that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

If allowed to stand, the decision below will be a precedent that will eviscerate the protection that stands between the ordinary citizen and often overzealous constabulary. As the Father of the Constitution noted:

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. *Memorial and Remonstrance*, James Madison, June 20, 1785.

We are now faced with the "usurped power" Madison warned against. We are faced with the situation in which the judicial efforts to accommodate the needs of law enforcement has accommodated instead the vengeful officer. Who, now, can be free of fear of full custodial arrest for the slightest infraction?

If the Court of Appeals is correct in its interpretation of this Court's rulings, then stepping off a curb to hail a cab can lead to more than a desk appearance ticket. It may be prelude to the humiliation of being fingerprinted, booked and incarcerated. Of course, it is highly doubtful that this will often occur to people with some status in society. Rarely does abusive police conduct target such people. It will be primarily used on the poor, the young, and minorities.

The recent – or rather recently noted – phenomena, of "driving while black" has lead to a spate of lawsuits providing more insight into police behavior. In a survey conducted by John Lambert, Ph.D. for just such a suit, it was shown that in forty-two hours of observations on I-95 in Maryland, 93% of the 5,741 observed drivers were violating some traffic law, thus subject to arrest. 17.5% of the observed drivers were African-American. Yet the records of the Maryland State Police (MSP) showed that of motorists stopped for traffic infractions and searched along this corridor, 72% were black. It should also be noted that contraband was recovered in only 28.4% of black motorists searched, and 28.8% of white motorists[2] disproving any validity of the common practice of racial profiling.

These statistics are really not startling. Many people expected that any survey would turn up such results.[3]

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[2] John Lamberth, *Report of John Lamberth, Ph.D.*, Nov. 8, 1996. Expert witness report for plaintiff in *Wilkins v. Maryland State Police*, Civil Action No. CCB-93-483, U.S. District Court for the District of Maryland. *See also*, plaintiff's brief in *Maryland State Conference of NAACP Branches, et al. v. Maryland State Police Civil Action* No. CCB-98-1098. U.S. District Court for the District of Maryland (Northern Division) Dr. Lamberth is the immediate past Chairman of the Department of Psychology and the past Director of the Division of Social Psychology at Temple University in Philadelphia.

[3] "Annual poll Shows That Most People Believe Racial Profiling by Cops Is Common", Jet Magazine, January 10, 2000. Citing a then-recent Gallup poll, the article noted that "more than 40% of Blacks of all ages and both genders said they believe they've been stopped because of their race", "and three-fourths of young Black men say they believe they have been pulled over by police just because they were Black."

The point, unfortunately, is that we can expect many police officers to treat people differently for the wrong reasons. We can expect some police officers with a grudge to improperly use their authority. The possibilities are really limitless. It could be the harassment of a fellow officer's ex-spouse or campaign workers of an incumbent sheriff's opponent or merely someone who is a thorn in the side of the local city council. In fact, it could simply be that the officer got up on the wrong side of the bed. Since this court has already indicated that it will not go into the underlying reasons for an otherwise valid police stop, even personal animosity is not subject to question.

Abusive police behavior has been and will always be with us, but until this decision, it has not had the judicial stamp of approval. This Court is in its usual position of being the last clear chance to contain abusive police behavior. The Fifth Circuit's opinion leaves us with a fundamental right that "consist[s] more in sound than in substance."

C. The correction of a misapplied or misunderstood Constitutional standard that has a far reaching effect is an appropriate reason for this Court to grant certiorari.

This Court has long held that the misapplication of federal standards by a lower court is a valid reason for granting certiorari. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491 (1951); *Mobil Oil Corp. v. Federal Power*

Commission, 417 U.S. 283, 310 (1974), reviewing misapplied federal regulatory standards even though primary responsibility rested with circuit courts of appeals.

It is also recognized by the Court that it will take a close look at the totality of the facts and circumstances in a case involving a potential violation of a fundamental liberty interest.

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment.

Pennekamp v. Florida, 328 U.S. 331, 335 (1948).

The *en banc* opinion does not fairly report or do justice to the facts of this case. The complete facts are found in the dissents to this decision: *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 *et seq.* (5th Cir.1999) and in the panel opinion, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.1999). A fair reading of the facts support neither a routine traffic stop nor a pretext stop to ferret out crime. They support a vindictive officer using his authority to harass and intimidate a young mother and her children. The *en banc* decision straitjackets the facts to make them fit a narrow mold.

> This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application. . . .

Ker, 374 U.S.at 23.

This Court has viewed significant splits in *en banc* decisions on weighty federal questions as a factor in deciding to grant certiorari. *Oil Workers Union v. Mobile Oil Corp.*, 426 U.S. 407, 412 (1976); *Miree v. DeKalb*, 433 U.S. 25, 27 (1977); *Rinaldi v. U.S.*, 434 U.S. 22, 25 (1977); *but see Ratchford v. GayLib*, 434 U.S. 1080 (1977) and *Kimble v. McDuffy*, 454 U.S. 1110 (1981). In this case the Court should be drawn to the adamantine position of the dissent. The instant case presents no mere difference of interpretation of facts based on a mutually accepted standard of law. The difference between the majority and dissenters is profound and fundamental. It is fully appropriate for this Court to settle the issue by granting certiorari.

CONCLUSION

Presenting this Court with a critical Constitutional question that goes to the core of our concept of ordered liberties, the instant case begs for Supreme Court review. Nothing less is at stake than the question of whether or not abusive police behavior is to find a comfortable nesting place as an exception to the general rule of reasonableness found throughout the Fourth Amendment. The ultimate effect of which will be felt by nearly every one in our nation. The policy enunciated by the ruling

below gives unfettered discretion to police officers to decided who among the many they stop for minor infractions will be selected for full-blown custodial arrest and detention. Petitioners' writ for certiorari should be granted to rectify this error.

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In The

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GAIL ATWATER, Individually, and MICHAEL HAAS as next friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused "at this time."

The Texas Criminal Defense Lawyers Association is an organization of over 2000 attorneys across Texas who represent citizens accused of crimes in both state and federal courts. TCDLA is the Texas affiliate of the National Association of Criminal Defense Lawyers. As such, TCDLA takes an active interest in important issues before this Court.

The instant case is brought under 42 U.S.C. § 1983 and therefore is a civil case. The issue it raises, however, could have important implications in constitutional criminal procedure. TCDLA's amicus brief more fully addresses some of these criminal procedure implications.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE**

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas nonprofit corporation with a membership of more than 2000 attorneys covering the State of Texas. TCDLA was organized almost three decades ago with the stated purposes of protecting and insuring by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases, to resist efforts to curtail such rights, to encourage cooperation between lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and through such cooperation, education and assistance to promote justice and the common good.

STATEMENT

Amicus adopts petitioner's statement of the case.

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* Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has before it an opportunity to review the reasonableness under the Fourth and Fourteenth Amendments of custodial arrests for minor traffic offenses that do not rise to the level of breaches of the peace. Through the evolution of the law surrounding searches incident to arrest, we have reached a point where a police officer may pull a person over for a traffic violation and immediately conduct a full search of his automobile. The reason for this is that, because the officer has the discretionary power to arrest for the traffic violation, he has automatic "probable cause to arrest" for purposes of the search incident to arrest doctrine. As explained below, this is creating documented abuses, particularly against racial minorities.

It is clear that through this evolution in the law, the doctrine of cases such as *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Long*, 463 U.S. 1032 (1983) has been rendered inapplicable to the vast majority of traffic stops. The solution is to hold that custodial arrests on minor traffic offenses not amounting to breaches of the peace are unreasonable seizures under the Fourth Amendment. This will remove the "automatic probable cause to arrest" that accompanies these traffic stops and re-establish the traditional requirements of reasonable suspicion and probable cause enunciated in *Terry* and its progeny.

This is clearly an important question of constitutional law and TCDLA joins Petitioner in requesting that this Court grant her Petition.

ARGUMENT

CUSTODIAL ARRESTS FOR MINOR TRAFFIC OFFENSES NOT RISING TO BREACHES OF THE PEACE ARE UNREASONABLE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS

All too often today a traffic stop becomes a nightmare for some hapless driver who fails to use a turn signal, fails to wear his seatbelt or dim his high beams, or commits any number of other minor traffic offenses. That is because for many drivers, the stop will not result in a ticket, but in a full-scale search incident to arrest, whether he is arrested or not.

In Texas a resident may be arrested for a myriad of moving, non-moving and equipment violations hardly rising to the level of breaches of the peace. *See* Tex. Transp. Code Ann. Subtitle C (Vernon 1999) (the "Rules of the Road"). The way the law stands right now, in Texas (as in many other states) a police officer may, in his discretion, arrest a driver when he sees the driver commit a traffic violation (with the exception of speeding). *See* Tex. Transp. Code Ann. § 543.001(Vernon 1999) ("Any peace officer may arrest without warrant a person found committing a violation of this subtitle."); Tex. Transp. Code Ann. § 543.004(a)(1) (Vernon 1999) (must ticket for speeding). Because he instantly has probable cause to arrest upon witnessing the traffic violation, the police officer may immediately conduct a full search incident to arrest rather than having to adhere to the more restrictive requirements of *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. Time and time again, we are seeing people stopped for traffic offenses, but prosecuted on evidence

recovered during such a search. Also coming to light are the many instances where the police conduct such a search, find nothing, and let the driver go. This is most frequently affecting minority drivers.

Under the dictates of *Whren v. United States*, 517 U.S. 806 (1996), we cannot even question the police officer about his actual motives in conducting the stop, but the increasingly available information suggests that these abuses are actually occurring. The position of the Texas Criminal Defense Lawyers Association is that custodial arrest for minor traffic violations is an unreasonable seizure under the Fourth and Fourteenth Amendments. The purpose of this Brief is to demonstrate the abuses attendant with the fact that, because an officer may arrest for virtually any traffic offense, he has automatic probable cause to arrest in virtually any traffic stop from the very time he sees the infraction. These abuses come mainly in the form of "pre-arrest searches incident to arrest," which have become sanctioned under this Court's more recent precedent.

A. The Changing Basis of the Search Incident to Arrest.

In the past, this Court has always impliedly, if not expressly, tied the power to conduct a search incident to arrest to the fact that a person is arrested. For instance, in *United States v. Robinson*, 414 U.S. 218 (1973), the defendant was actually arrested for operating his car without a license. *See id.* at 220. The issue in that case was whether the police officer could then conduct a search incident to the arrest. *See id.* at 235. The Court held that the officer

could. *See id.* In setting out the law, the Court stated as follows:

> It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee *by virtue of the lawful arrest*. The second is that a search may be made of the area within the control of the arrestee.

Id. at 224 (emphasis added).

Decided the same day as *Robinson* was *Gustafson v. Florida*, 414 U.S. 260 (1973), also a case in which the defendant was arrested for driving without a license and searched. *See id.* at 262. The Court again expressed its reasoning justifying a search incident to arrest in terms likewise suggesting that it was the fact of the arrest that gives rise to the power to conduct a search incident to that arrest:

> We hold, therefore, that upon arresting petitioner for the offense of driving his automobile without possession of a valid operator's license, *and taking him into custody*, [the officer] was entitled to make a full search of petitioner's person incident to that lawful arrest. *Since it is the fact of custodial arrest which gives rise to the authority to search*, it is of no moment that [the officer] did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed.

Id. at 266 (emphasis added); *see also New York v. Belton*, 453 U.S. 454, 460-63 (1981) (search took place after the arrest).

With the 1980 decision of *Rawlings v. Kentucky*, 448 U.S. 98 (1980), however, the power to conduct a search incident to arrest became tied not to the fact of the arrest itself, but to the *presence of probable cause to arrest*. The genesis of this evolution was the following language in *Rawlings*:

> Once petitioner admitted ownership of the sizable quantity of drugs found in [her companion's] purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Id., 448 U.S. at 111. Even though this language still contemplates a "formal arrest" actually taking place, it expressly dispensed with any kind of requirement that the arrest happen before the search incident to that arrest. This language has been universally taken to heart by the lower courts.

Since *Rawlings*, the pre-arrest search incident to arrest has further evolved into two general types: (1) Those where the initial probable cause to arrest (that justifying the search) is the reason for both the search and the ultimate arrest; and (2) those where the person's actual arrest and subsequent prosecution are based not upon the reason for the initial probable cause, but upon evidence found during the search.

One example of the first category is *United States v. Tavolacci*, 704 F.Supp. 246 (D.D.C. 1988). *Tavolacci* is a drug courier case. *See id.* at 247-48. The defendant, a passenger on a train, fit certain aspects of a drug courier profile and thereby got the attention of the authorities. *See id.* During his trip, some law enforcement officers questioned him and asked him if they could search or have a dog sniff his suitcase. *See id.* at 248. He declined, but was detained anyway while the agents waited for a dog. *See id.* At one point while he waited, he attempted to bribe one of the agents with cocaine. *See id.* Ultimately, a dog did sniff his suitcase, but did not alert. *See id.* at 248-49. Nonetheless, one agent, without defendant's consent, opened the suitcase, at which time the dog alerted and the agents found cocaine. *See id.* at 249. Defendant was then arrested for possession of cocaine. *See id.* The court held that the search of the suitcase was a valid search incident to arrest because there existed probable cause to arrest the defendant for possession of cocaine at the point he made his admission to the agent. *See id.* at 248, 251; *see also United States v. Donaldson*, 793 F.2d 498, 502-03 (2nd Cir. 1986) (probable cause to arrest which supported pre-arrest search of defendant's apartment was based on defendant giving a conflicting story about a fugitive's whereabouts, after fugitive found in his apartment, defendant arrested and prosecuted for harboring a fugitive); *United States v. Thornton*, 733 F.2d 121, 128 n.9 (D.D.C. 1984) (probable cause to arrest which supported pre-arrest search was based on defendant, during a drug raid at apartment complex and after somebody yelled, "Police," shoving something that looked like drugs into his back pocket,

defendant searched, arrested and prosecuted for possession of drugs); *United States v. Jaramillo*, 714 F.Supp. 323, 332-33 (N.D. Ill. 1989) (probable cause to arrest which supported pre-arrest search was based on defendant fitting drug courier profile and bulkiness around defendant's waist, defendant arrested and prosecuted for possession of drugs); *United States v. Pace*, 709 F.Supp. 948, 956-57 (C.D. Cal. 1989) (probable cause to arrest which supported pre-arrest search was based on officer feeling two kilo bricks of cocaine strapped to defendant's back during a consensual pat-down search of outer garments, defendant arrested and prosecuted for possession of drugs).

Cases falling into the second category, on the other hand, are cases where the pre-arrest search incident to arrest is supported by probable cause to arrest on one basis, but the arrest is made after the "pre-arrest search incident to arrest" turns up something else, usually some kind of contraband. This has come to be most commonly seen where the probable cause to arrest is based on some traffic offense, but the ultimate arrest (after a search) is based on contraband that was found during the search.

A good example in this category is the recent case of *United States v. Lugo*, 170 F.3d 996 (10th Cir. 1999). In this case, the defendant was stopped by a police officer for speeding. *See id.* at 1000. Once stopped, the officer learned that the defendant had no driver's license. *See id.* In Utah (as in Texas) a person can be arrested for driving without a license. *See id.* at 1003. The officer asked defendant to exit the car and patted him down for weapons. He then did a complete search of the passenger compartment of the car, finding cocaine in a secret compartment under

the carpet in the back seat area. *See id.* The defendant was then arrested for possession of a controlled substance. *See id.*

In analyzing the legality of the search, which most definitely took place prior to the arrest, the Tenth Circuit Court of Appeals set out a framework very reminiscent of *Rawlings*: "A warrantless search incident to arrest is valid so long as (1) there existed a legitimate basis for the arrest before the search; and (2) the arrest took place shortly after the search." *Id.* at 1003 (citing *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998)); *see also Rawlings*, 448 U.S. at 111. The court went on to apply the first prong of this analysis, observing, "Here, the officer observed that [the defendant] was speeding and operating a vehicle without a valid driver's license. Under Utah law, these offenses are class C misdemeanors, and the officer had the authority to lawfully arrest [the defendant] for committing these offenses. Thus, probable cause and a legitimate basis to arrest [the defendant] existed." *Id.* (citations omitted).

The reported case law in Texas is dotted with similar examples. For instance, in *Williams v. State*, 726 S.W.2d 99, 99-101 (Tex. Crim. App. 1986), the defendant was arrested and prosecuted for unlawfully carrying a weapon. A police officer witnessed the defendant in his truck, which was parked on the wrong side of the road. With the intention of investigating for drugs, he walked up to the defendant's truck. Once at the truck, the officer saw a paper bag on the floorboard of the truck. *See id.* at 100. He reached down, seized the bag and opened it, finding two pistols. The defendant was then arrested for the pistols. The Court of Criminal Appeals held that the search was a

valid search incident to arrest because the officer could have arrested the defendant for parking on the wrong side of the road. *See id.* at 101.

The defendant in *State v. McCall*, 929 S.W.2d 601 (Tex. App. – San Antonio 1996, no pet.) was also arrested and prosecuted for unlawfully carrying a weapon. *See id.* at 602. He was stopped in his car for failure to have a license plate light, which, under Texas law, also gave the officer probable cause to arrest, if he chose to do so. *See id.*; *see also* Tex. Transp. Code Ann. §§ 547.322(f), 542.301(a), 543.001 (Vernon 1999) (rear license plate must be illuminated; failure to comply is an offense; general authorization to arrest). He searched the car and found weapons, and thereafter arrested the defendant for possession of those weapons. *See McCall*, 929 S.W.2d at 602.

B. The Abuses Resulting from this Evolution in the Law Serve to Demonstrate That an Arrest for a Minor Traffic Violation Is "Unreasonable" Under the Fourth Amendment.

These are the cases, however, where the police actually *found* something in their search. The abuses inherent in this practice are demonstrated in the instances where the officers stop a driver for a traffic offense, conduct a search, find nothing, and let the driver go. The most grievous abuse is not where the police officer follows a hunch that proves right, but when he follows a hunch that proves to be wrong. Technically, the search incident to arrest would then have been illegal because the "formal arrest" did not "follow[ ] quickly on the heels of the . . . search," *Rawlings*, 448 U.S. at 111, but it would be

up to the driver to tell somebody. These abuses are visited most often on minorities. *See* David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways* (June 1999) at 18-24, available at www.aclu.org/profiling/report (extensive treatment of statistics from a number of different cities showing the number of total traffic stops versus the number of those stops that involve minorities). Victims of this type of police abuse tend to not often tell their stories. As two authors recently observed, "[A]n illegally searched innocent minority member is less likely to have the resources to mount a lawsuit to expose inadequate internal investigation procedures than a white yuppie." William H. Buckman & John Lambreth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, The Champion, Sept./Oct. 1999, at 14.

Shifting the focus from the fact of the arrest to the mere presence of probable cause to arrest on any ground has in a great number of cases turned the search incident to arrest into an instrument of oppression. *See generally* Harris, *supra*, at 9-18 (detailing several specific accounts where persons' cars were searched, and sometimes even dismantled, after being pulled over by the police for traffic violations but where ultimately no arrest occurred). The way the law stands right now, if a police officer decides that he just wants to check to see if a particular driver happens to have any drugs on him, he pulls in behind him in traffic and waits. Eventually, the driver will fail to use a turn signal to indicate a lane change or commit some other minor traffic violation. At that point, the police officer has probable cause not only

to stop, but to arrest. He pulls the driver over and immediately conducts a full-scale search incident to arrest. Finding drugs, he arrests the driver on a drug charge. Not only is this scenario not prohibited by this Court's pronouncements, it is positively sanctioned by them. *See Whren v. United States*, 517 U.S. 806, 813 (1996); *New York v. Belton*, 453 U.S. 454, 460-63 (1981); *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980). In light of *Whren*, an officer cannot even be questioned about his motivation for the stop. *See id.*, 517 U.S. at 813. All that matters is the existence of probable cause to arrest, which, as it happens, is automatically present at virtually every traffic stop that is made anywhere by reason of an arcane collection of traffic regulations.

This Court stated in *Sibron v. New York*, 392 U.S. 40, 63 (1968), "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." This axiom has been reaffirmed in later cases, *see, e.g., Smith v. Ohio*, 494 U.S. 541, 541-43 (1990), and was even stated in *Rawlings* itself. *See id.*, 448 U.S.at 111 n.6. We have begun, however, to see case after case in which officers stop a driver for a traffic offense, conduct a search, and arrest the driver for what they find. This turns the *Sibron* "axiom" into nothing more than a legal fiction.

David Harris recounts an incident in his article on racial profiling where Nelson Walker, a black college student, was stopped in North Carolina in 1998 for not wearing a seatbelt:

> The officers detained him and his two passengers for two hours as they searched for illegal drugs, weapons, or other contraband.

> Finding nothing in the car, they proceeded to dismantle the car and removed part of a door panel, a seat panel and part of the sunroof. The officers found nothing and in the end handed Walker a screwdriver, saying, "You're going to need this," as they left the scene.

Harris, *supra*, at 13. Even more stunning than the level of abuse Mr. Walker suffered at the hands of those officers is the fact that if the search had turned up just one marijuana cigarette, everything those officers did on that day would not only have been vindicated, but not even subject to question!

C. Traffic Stops Should Be Subject to the Same Reasonable Suspicion and Probable Cause Standards as All Other Police/Citizen Encounters.

The fact that a police officer may arrest for a traffic offense has created a shortcut around the Fourth Amendment and the requirements this Court has otherwise set for police-citizen encounters, searches and arrests. *See Michigan v. Long*, 463 U.S. 1032, 1049-50, 1049 n.14 (1983) (setting out the limits of a search under *Terry v. Ohio*, 392 U.S. 1 (1968) as they apply to automobiles and drawing a distinction between a *Terry* search and a search incident to arrest). So long as a law is on the books allowing police officers the discretion to arrest drivers for minor traffic offenses, there will always be probable cause to arrest and therefore always be an automatic basis for a search. *See Whren*, 517 U.S. at 813 (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). What has happened is that the rules enunciated in *Terry* have been abrogated in perhaps the vast majority of vehicle stops. While a search incident

to arrest is supported by a governmental interest in preserving evidence, such a search cannot be legitimately supported by an interest in blindly searching for evidence of any type. *See Long*, 463 U.S. at 1049 n.14; *Chimel v. California*, 395 U.S. 752, 762-63 (1969). There is no societal need, nor a reasonable law enforcement need, that is met by denying a citizen the protections of *Terry* just because he is driving his car rather than walking down the street. To think that evidence of a traffic offense might be concealed in the driver's car, or that the driver could actually destroy such evidence, is patently ridiculous in any event. The more rational approach would be to re-apply the traditional standards of reasonable suspicion and probable cause to traffic stops.

This Court should recognize that it is unreasonable under the Fourth and Fourteenth Amendments for a police officer to have the power to affect a custodial arrest for minor traffic violations – especially where the decision to arrest is left to that officer's discretion – unless those violations amount to a breach of the peace. Where a police officer observes a traffic offense, he *should* have probable cause to stop and give a citation. If, during that stop, additional reasonable suspicion or probable cause develops, he may investigate further as appropriate under the established standards. *See Long*, 463 U.S. at 1049-50; *Florida v. Royer*, 460 U.S. 491, 497-501 (1983); *Michigan v. Summers*, 452 U.S. 692, 699 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Adams*

v. Williams, 407 U.S. 143, 145-49 (1972); *Terry v. Ohio*, 392 U.S. at 21-22, 27. So long as he can justify his actions under the *Terry* standard, his subjective intentions still would not matter. Otherwise, he should not be given carte blanche to conduct an invasive, full-blown search incident to arrest, before an arrest is affected, on a minor traffic offense for which he would in all likelihood issue a ticket. That he can presently do so only serves to further highlight the fact that custodial arrests for minor traffic violations which are not breaches of the peace are unreasonable seizures under the Fourth and Fourteenth Amendments.

PRAYER

For these reasons, *amicus* prays that this Court will grant review in the above cause to examine this important issue.

Dated: March 20, 2000
Fort Worth, Texas

Respectfully submitted,

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MOTION FILED
MAR 24 2000

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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Gail Atwater was placed under custodial arrest for not wearing a seat belt, a misdemeanor that carries a fifty-dollar fine as its maximum penalty. Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37 of this Court, *amici curiae*, the National Association of Defense Lawyers and the Association of Federal Defenders move for leave to file the accompanying brief *amici curiae* in support of the petition for certiorari.

The petitioners, who are represented by legal counsel, have consented to the filing of this brief *amici curiae*. The respondents, similarly represented by counsel, have not consented to the filing of this brief.

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. The Association of Federal Defenders is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices, all created by the Criminal Justice Act, 18 U.S.C. § 3006A.

Consistent with their goals of advancing the protections of persons against arbitrary treatment at the hands of the criminal justice system, NACDL and AFD offer their legal analysis of an arrest for the petty offense of driving without a license. Both organizations regularly appear before this Court as *amicus curiae*, have an expertise in criminal law, and a commitment to the rights of the accused.

Amici curiae therefore are able to provide a unique perspective to this Court on practical and legal problems with misdemeanor arrests that involve no breach of the peace, the issue raised in the petition for writ of certiorari. *Amici curiae*

therefore respectfully request that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, NACDL has almost 10,000 members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military personnel and law professors. NACDL has members in all fifty states, and the American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates.

Among NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. NACDL urges this Court to review the decision of the United States Court of Appeals for the Fifth Circuit as the lower court decision provides for vast officer discretion, permitting the overzealous officer to arrest any person he chooses for the pettiest of offenses. The Fourth Amendment is designed to constrain the discretion of the officer in the field and assure that his conduct in seizing citizens, when permissible, is reasonable. The Fifth Circuit decision provides neither assurance. Accordingly, NACDL files this brief in support of the petition for writ of certiorari

The Association of Federal Defenders ("AFD") was formed in 1995 to enhance the representation under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

Amendment of the United States Constitution. The AFD is a nation-wide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. We believe that this mission calls upon us to join in asking the Supreme Court to the review the *Atwater* case. Although it is a civil rights action rather than a criminal case, *Atwater* presents an issue of great importance in criminal law: whether the Fourth Amendment prohibits the use of custodial arrests for fine-only traffic offenses. A full custodial arrest invades one's privacy interests and one's dignity, and can often lead to criminal prosecution on other charges. It is in the interest of our clients to ask the Supreme Court to review the Fourth Amendment's requirements in this area.

SUMMARY OF ARGUMENT

This Court has held that even where an officer has probable cause to believe a suspect has committed a crime, the reasonableness of the manner of seizure is governed by the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1 (1985).

Reasonableness is first viewed through the lens of the common law. "[A]n examination of the common-law understandings of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." *Payton v. New York*, 445 U.S. 573, 591 (1980). At common law, a misdemeanor arrest was not permitted absent a reason to believe that the suspect would occasion a breach of the peace if not arrested. Sir

James Stephen, *History of the Criminal Law of England* 193 (1883).

The reasonableness of a seizure is further considered by weighing the state's interests in the seizure against the individual's liberty interest. *Garner*, 471 U.S. at 8. The state's interest in detaining a person charged with a crime are ensuring the defendant's presence at trial and preventing further harm at the defendant's hands in the interim. *See United States v. Salerno*, 481 U.S. 739 (1987). A defendant charged with a fine-only misdemeanor offense is unlikely to attempt to evade the justice system given the very minimal potential punishment and the relatively onerous sanctions for failure to appear. Failure to appear is a separate offense and failure to answer a traffic charge can lead to suspension of one's driver's license in her state of origin, irrespective of the location of the offense. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 17 Pace L. Rev. 97, 159 n. 320 (1997) (noting many states have joined the Non-Resident Violator Compact permitting the suspension of a driver's license in her home state for failure to answer a traffic charge in another state).

Finally, this Court's holding in *Knowles v. Iowa*, 525 U.S. 113 (1999) demonstrates this Court's assumption that a misdemeanor that involves no breach of the peace does not justify a custodial arrest. This Court held in *Knowles* that a search incident to arrest could not occur if a motorist is merely given a citation for a traffic offense. *Id.* at 118. Long-standing precedent of this Court permits a search incident to arrest prior to the actual arrest, so long as an officer has probable cause to make the arrest at the time of the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). If probable cause to believe a motorist had committed a traffic offense permitted a custodial arrest, then the search of

Mr. Knowles would have been justified as an arrest *could* have taken place.

Notwithstanding the fairly clear application of this Court's doctrines to the issue of misdemeanor arrests involving no breach of the peace, a variety of results have appeared in the lower courts.

The First Circuit has recognized that the Fourth Amendment requires that the seizure of a person for a misdemeanor offense must be reasonable, that probable cause does not end the inquiry into whether an arrest is reasonable. *Diaz v. City of Fitchburg*, 176 F.3d 560 (1st Cir. 1999). The Ninth Circuit has held that the Fourth Amendment forbids an arrest for a misdemeanor if state law prohibits such an arrest. *United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993).

The Court of Appeals decision in the instant case is to the contrary, holding that so long as officers have probable cause to believe a misdemeanor infraction has occurred, an arrest is permissible so long as the suspect is not killed or maim in the seizure. *Atwater v. City of Lago Vista*, 195 F.3d 242, 245 (5th Cir. 1999) (*en banc*).

A patchwork of official discretion is left in the wake of these decisions -- citizens in the Ninth Circuit are subject to misdemeanor arrests unless their state legislatures provide otherwise, citizens in the First Circuit are subjected only to "reasonable" misdemeanor arrests, while citizens in the Fifth Circuit enjoy no federal constitutional protection from such seizures.

This Court should grant certiorari so that this important question of whether citizens may be subjected to such official discretion may be considered.

ARGUMENT

I. THE FEDERAL CONSTITUTION'S LIMITATIONS ON THE POWER TO CONDUCT A MISDEMEANOR ARREST HAVE BEEN DIVERSELY INTERPRETED BY FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT.

Some federal courts of appeal and state courts of last resort have held that the Fourth Amendment imposes no limitations on an officer's discretion to arrest for a misdemeanor. Others have held that an officer may never arrest for a simple misdemeanor. In short, every possible manner of applying the Fourth Amendment to this question appears in the reported decisions. A hodgepodge of officer authority exists -- in Tennessee, a motorist may not be arrested for reckless driving, traveling 92 miles per hour in a 65 mile per hour zone. *See State v. Colzie,* No. M1998 00253 CCA R3 CD, 1999 WL 1074111 (Tenn. Crim. App., November 30, 1999). The same motorist, in Texas, may be arrested, searched, the contents of her car inventoried for failure to wear her seat belt. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (*en banc*).

Fourth Amendment limitations on the power to arrest for a misdemeanor involving no breach of the peace could take one of three forms:

(1) The amendment may prohibit the arrest as such an arrest was impermissible under the common law and involves an intrusion into individual liberty exceeding the state's interest in the custodial arrest. *See State v. Hehman*, 578 P.2d 527 (Wash. 1978) (finding as a matter of state public policy the degree of intrusion exceeds the state's interest in prosecuting an ordinary traffic offense); *Diaz v. Fitchburg*,

176 F.3d 560 (1st Cir. 1999) (recognizing Fourth Amendment may prohibit certain category of misdemeanor arrests, but not where the crime is trespass which under Massachusetts law requires a person to refuse an official request to leave, demonstrating a violation that will not conclude absent an arrest).

(2) Statutory provisions on the power to arrest may define those intrusions which are unreasonable. *See United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993) (state prohibition on custodial arrest for minor infraction renders such an arrest violative of the Fourth Amendment); *State v. Bland*, 884 P.2d 312 (Colo. 1994) (*en banc*) (custodial arrest for misdemeanor marijuana possession not permitted in light of statute providing for citation for offense); *State v. Chearis*, 995 S.W.2d 641 (Tenn. Crim. App. 1999) (arrests for misdemeanors unreasonable given state statute prohibiting arrest except where prosecution would be jeopardized by citation or breach of peace is threatened).

(3) The amendment imposes no limitations on arrests based on probable cause that occur outside the home that do not involve deadly force. *Atwater v. City of Lago Vista*, 195 F.3d 242, 244 (5th Cir. 1999) (*en banc*). This interpretation expands the doctrine of *Whren v. United States*, 517 U.S. 806 (1996) beyond facts ever contemplated by this Court. This interpretation assumes that since a seizure may always occur whenever an officer has probable cause to believe a citizen has committed a crime, that the *manner* and *degree* of his seizure are beyond the scope of the Fourth Amendment.

These widely varying interpretations of the Fourth Amendment leave citizens of varying jurisdictions at the hands of officers with vastly different degrees of discretion. The approach taken by the lower court permits an officer to take a motorist into custody, lead her away in handcuffs, have her booked, leave her with an arrest record, and require her to remain incarcerated until posting bond for an offense so minor that even a judicial officer could not order the sanctions imposed by the officer. The reasonableness of this intrusion, under present law, turns on the location of the arrest.

This Court must grant certiorari lest officer discretion to perform intrusions turn on geography and jurisdiction. This Court has clearly stated that the reasonableness of an intrusion is considered in light of the limitations imposed by the common law and in consideration of a balance of a state's interest in the intrusion against the individual's liberty interest.

The common law prohibition on arrests for misdemeanors is compelled by balancing the interests of the state in the arrest against the individual's liberty interest. The State simply has no interest in arresting those who face only a fine and pose no danger to the community. Certiorari should be granted as contrary holdings permit overzealous officers, or officers desiring suspicionless searches, to perform full custodial arrests for the most minor of violations.

II. THE COMMON LAW PROHIBITED TAKING A MISDEMEANANT INTO CUSTODY ABSENT AN ANTICIPATED BREACH OF THE PEACE.

This Court looks first to the common law to determine whether a governmental intrusion satisfies the Fourth Amendment. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The common law did not permit a constable to make an arrest for a misdemeanor unless it was committed in his presence and involved a breach of the peace that was likely to continue. Sir James Stephen, *History of the Criminal Law of England* 193 (1883).

This Court has previously recognized limitations imposed by the common law on the power to arrest. "A peace officer... has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Carroll v. United States*, 267 U.S. 133, 157 (1925).

Misdemeanor arrests at common law were for the purpose of preventing the harm that would flow from a breach of the peace. As Sir James Stephen observed in his commentary on the English criminal law:

> The common law did not authorise the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace either by an affray or by violence to an individual. In such cases the arrest had to be made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.

Sir James Stephen, *History of the Criminal Law of England*, 193 (1883).

Lord Holt observed in 1710 that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest." *Regina v. Tooley*, 2 Lord Raymond 1296,1301, 92 Eng. Rep. 349, 352 (K.B. 1710). As one modern commentator has noted, "[t]his is to say that the arrest was not strictly part of the punishment process. It was mostly for the purpose of separating the

combatants and detaining them to prevent further violence." Edward C. Fisher, *Laws of Arrest* 189 (1967).

The offense of driving without a seat belt is not one of violence -- no breach of the peace is intended or occasioned by one who elects to travel the highway less than secure in the event of an accident. Certainly nothing beyond the fact the motorist was once caught without a seat belt suggests that even this minor crime will continue lest she is immediately removed from the roadway. The common law, the starting point in this Court's analysis of the reasonableness of an intrusion, simply did not contemplate an arrest for such a minor, non-violent misdemeanor.

In *Garner*, this Court departed from the common law rule permitting deadly force to seize a fleeing felon. The Court recognized that advances in technology and changes in public opinion as reflected in limitation on officer's use of deadly force compelled a departure. The effectiveness of modern weapons made use of a deadly weapon to apprehend a fleeing felon far more likely to kill than an attempt to seize a suspect with the weapons contemplated at the time of the common law rule. *Garner*, 471 U.S. at 11. The individual interest implicated by permitting the use of deadly force was therefore more compelling than under a regime where the weapons were much more likely to wound, or miss entirely, than kill. Modern limitations on the use of official force further illustrated that all reasonable means of seizing a non-violent fleeing felon at common law were not reasonable in modern times. *Id.* at 16-19.

Modern legislation and technology has made the use of a custodial arrest for a misdemeanor even less compelling than it was at the time it was forbidden by the common law. The Non-Resident Violator Compact has given a state the power to suspend the driver's license of a motorist of another state who fails to appear in court to answer a misdemeanor traffic

charge. *See* Salken, *supra*, at 159. Computer technology permits an officer stopping such a motorist to rapidly learn the status of such motorist's license. Technology and legislation have given states a way of compelling appearance in misdemeanor traffic offenses unknown at common law -- at a time when the common law nonetheless prohibited a custodial arrest for misdemeanors.

Garner further looked to contemporary limitations on police use of force to determine whether deadly force ought to be permitted. Finding the modern trend to prohibit deadly force for non-violent fleeing felons, the Court found reasonableness should be assessed differently than it was under the common law. *Garner*, 471 U.S. at 16-19.

Many states limit the power of officers to arrest citizens for misdemeanor violations. For some time, an arrest for a misdemeanor has typically been permitted by state statute only where releasing the citizen upon a citation would threaten a breach of the peace or jeopardize the prosecution.[2]

Limitations on the power to arrest for misdemeanors not constituting a breach of the peace reveal that modern society finds it unreasonable to vest law enforcement officers with such unlimited discretion. Interestingly, Texas law, by

[2] *See, e.g.* Alaska Stat. § 12.25.180(b) (1984); Cal. Vehicle Code § 40504 (West 1985); Colo. Rev. Stat. § 42-4-1501(4)(a) (1988); Ind. Code Ann. § 9-4-131 (Burns 1987); Ky. Rev. Stat. Ann. § 431.015(2) (Baldwin 1985); La. Rev. Stat. Ann. § 32:391 (West 1988); Md. Trans. Code Ann. § 26-202(a)(2); Mass. Gen. Laws Ann. § ch. 90 § 21 (West Supp. 1988); Minn. Stat. Ann. § 169.91 (West 1986 & Supp. 1989); Neb. Rev. Stat. §§ 29-427, -432, -435, -39-6, 105 (1984-1985); N.M. Stat. Ann. § 66-8-123 (1987); N.D. Cent. Code § 39-07-07 (1987); Okla. Stat. Ann. tit. 22 § 1115.1(A) (West Supp. 1989); Or. Rev. Stat. §§ 133.310(1), 810.410, 811.140 (1987); S.C. Code § 56-25-30 (Law Co-op. Supp. 1988); S.D. Codified Laws Ann. § 32-33-2 (1984); Tenn. Code Ann. § 40-7-118(b)(1) (Supp. 1988); Va. Code Ann. § 46.1-178 (Supp. 1988); Wis. Stat. Ann. §§ 345.22 to .23 (West Supp. 1988); Vt. R. Crim. P. 3(a), (c).

statute, prohibits a custodial arrest for speeding. Tex. Trans. Code Ann. § 543.003 (West 1999). Speeding carries a higher fine under Texas law than the crime for which the petitioner was arrested, failure to wear a seat belt. And while speeding potentially endangers others, failure to wear a seat belt imposes a risk only to those who elect to violate the law.

III. THE MANNER OF A SEIZURE MUST BE REASONABLE IN LIGHT OF THE STATE'S INTERESTS

This case squarely presents the issue of whether probable cause ends the analysis of whether a seizing officer's behavior is reasonable. This Court has previously held that probable cause does not end that inquiry, that while an officer may have the right to seize a citizen, the quality and character of that seizure is still subject to the limitations of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). Probable cause permits a seizure, *Whren v. United States*, 517 U.S. 806, 813 (1996), but the manner in which the seizure is carried out must be reasonable in light of the government's interest in the seizure. *Garner*, 471 U.S. at 8. The lower court decision would permit an officer to seize a citizen in any manner he saw fit so long as the officer had probable cause to believe that some offense -- however petty -- had been committed and the arresting officer did not actually kill or maim the suspect. *Atwater*, 195 F.3d at 245.

A. The State's Interest in Ensuring the Defendant's Presence at Trial and Protecting Society from a Criminal Suspect Does Not Justify a Custodial Arrest for a Fine-Only Misdemeanor.

Once a state has probable cause to believe a citizen guilty of a criminal infraction, the state's interests in seizing her consist of ensuring her presence at trial and ensuring that

the citizenry is safe from her pending trial. *See United States v. Salerno*, 481 U.S. 739, 748 (1987) (recognizing these interest to justify pretrial detention). It has been recognized that the seriousness of the offense is a key indicator of the likelihood of the defendant appearing to answer the charges against her. Fisher, *supra*, at 189. Further, this Court in *Salerno* recognized that the seriousness of the offense was a valid indicator of whether the defendant posed a threat to society if released pending trial. *Salerno*, 481 U.S. at 749. If a goal of punishment is incapacitation, society needs protection from the violent once their dangerous tendencies become evident.

For most modern misdemeanors, pretrial release is all but certain, making the relevant inquiry whether the misdemeanor suggests the defendant presents a danger he will not later present once booked and bonded out. The common law rule prohibiting misdemeanor arrest recognizes the legitimate interests of ensuring the offender's presence at trial and protecting society from the suspect. For ordinary misdemeanors, where the penalty is less than severe, the suspect is not likely to fail to appear as often the sanction for failure to appear exceeds the sanction for the underlying misdemeanor. And, unlike the crimes of extortion and conspiracy to commit murder contemplated in *Salerno*,[3] the commission of a non-violent misdemeanor does not suggest that society needs immediate protection from the suspect.

Where, however, the state illustrates that the misdemeanant, despite the relative minor classification of his crime, does pose an immediate threat to public safety, the common law rule provides for his immediate incarceration. If the constable reasonably believed that the misdemeanant

[3] In *Salerno*, the defendants were charged with 35 acts of racketeering activity including fraud, extortion, gambling, and conspiracy to commit murder. *Salerno*, 481 U.S. at 743.

would cause a breach of the peace if not arrested, then an arrest was permitted.

A modern example of a misdemeanor that itself suggests the necessity of incarceration is driving under the influence where the driver poses a risk to society because of his intoxication, a condition unchanged by his initial seizure. Modern statutes universally recognize an officer's right to arrest a motorist suspected of being intoxicated.[4]

Whren v. United States, 517 U.S. 806 (1996) stands for the rather unremarkable principle that any person who violates the traffic code may be forced to suffer the consequences established by the legislature, a very modest fine. *Whren* did not overrule this Court's holding that the degree of the intrusion occasioned to prosecute the offense must be balanced against the state's interest in that degree of intrusion.

B. Absent a Fear for Public Safety or Inability to Otherwise Bring Offender to Justice, the Means of Seizure May Not Exceed the Punishment Authorized for the Offense.

As this Court recognized in *Garner*, at common law, burglary was a capital crime. *Garner*, 471 U.S. at 13. Imploring deadly force to stop an unarmed burglar therefore involved no greater consequence than the burglar would face if convicted. Modern laws provide much more lenient penalties for burglary and this Court accordingly held in *Garner* that the consequence of death was disproportionate to

[4] *See e.g.* Tenn. Code Ann. § 40-7-118(c)(7) (requiring misdemeanor arrest "the person is so intoxicated that such person could be a danger to such person or to others.")

the state's interest in ensuring prosecuting of a non-capital felon who posed no risk to the community.

Judge Easterbrook has recognized that an arrest for a misdemeanor offense amounts to more punishment than will typically be assigned by a neutral judicial officer. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986). A warrantless arrest for such an offense is a decision by a member of the law enforcement community to bring about a s anction exceeding that likely imposed by a neutral and detached judicial officer. When the offense is a fine-only misdemeanor, the law enforcement officer has visited a sanction upon a citizen exceeding even a judicial officer's *authority* to punish.

C. This Court's Decision in *Knowles v. Iowa* Assumes Constitutional Limitations on an Officer's Power to Arrest for a Misdemeanor Traffic Offense.

This Court recently and unanimously held that an officer may not perform a search incident to citation for an ordinary traffic offense -- that is, if an officer does not actually arrest a suspect, a search incident to arrest is unconstitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). This decision assumes that a custodial arrest for a misdemeanor traffic offense alone does not permit a custodial arrest.

This Court has held that where police have probable cause to arrest a suspect, it is constitutionally irrelevant whether the search incident to arrest occurs before or after the suspect is actually placed under arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). As Justice Harlan wrote,

> If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

Peters v. New York, 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

If the traffic offense in *Knowles*, speeding 42 miles per hour in a 25 mile-per-hour zone, had permitted a custodial arrest, then the officer who searched Mr. Knowles would have had probable cause to make an arrest. In *Rawlings* and *Peters*, this Court applied an objective test to determine whether the pre-requisites had been met for a search incident to arrest. The Court looked to whether probable cause existed for an arrest, not whether the officer had actually announced the arrest and placed the suspect in formal custody.

If probable cause to believe a suspect committed the misdemeanor traffic offense of speeding permitted a custodial arrest under the constitution, then it would have been irrelevant whether the officer performed the search incident to arrest before or after the arrest. Probable cause to believe the suspect has committed a crime serious enough to justify a custodial arrest is the only pre-requisite to a search incident to arrest under *Rawlings* and *Peters*.

This Court's unanimous decision in *Knowles* therefore assumes that the constitution does place limitations on an officer's power to arrest for an ordinary misdemeanor traffic offense.

The Court's analysis of the doctrine of search incident to arrest in *Knowles* further demonstrates it assumed that a custodial arrest for an ordinary traffic violation is constitutionally unreasonable. The State of Iowa argued that a search incident to a traffic violation was permitted because the stopped motorist might try to destroy evidence of another crime or destroy evidence relating to his identity. This Court found the possibility that an officer would stumble onto evidence of an unrelated crime to be remote. The Court further found that "[a]s for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Knowles*, 525 U.S. at 118.

The clear inference is that there must be a *basis* for distinguishing between those arrested and those cited. If there were no basis for the distinction then every minor traffic offender would be liable to arrest and the search of Mr. Knowles' vehicle would have violated no legitimate expectation of privacy.

The Court's conclusion that the search of Mr. Knowles' vehicle violated his right to be secure in his person, house, papers, or effects clearly reflects the assumption by this unanimous Court that the state's interest in prosecuting a misdemeanor traffic offense does not justify a custodial arrest.

IV. THE POWER TO ARREST FOR MINOR TRAFFIC OFFENSES GRANTS BROAD AUTHORITY TO SEARCH NEARLY EVERY AUTOMOBILE MERELY BECAUSE IT IS ON THE HIGHWAY

"Very few drivers can traverse any appreciable distance without violating some traffic regulation." B. James George, *Constitutional Limitations on Evidence in Criminal Cases* 65 (1973 ed.) Given the extensive regulation of motor vehicles and their operation, the Fifth Circuits's *en banc* decision means that an officer could select any motorist he desires, place him under arrest for a minor traffic violation, a violation no more serious than those committed by the bulk of all automobiles on the highway, and thereby acquire the right to search the entire car. *See New York v. Belton*, 453 U.S. 454 (1981) (search of cabin of car permitted incident to lawful arrest); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search of impounded cars of arrested drivers permitted provided search is consistent with standard inventorying procedures).

Beyond an officer's interest in aggressively engaging in "the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 13 (1948), forfeiture laws have created a powerful incentive for officers to inspect as many automobiles as possible for the presence of drugs. Even a relatively small amount of unlawful contraband permits the forfeiture of an automobile carrying the contraband. The effect of this bounty to the state on an individual officer cannot be overstated. The financial existence of many of the drug interdiction units depends on the bounty from forfeiture. Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Agenda*, 65 U. Chi. L. Rev. 35 (1998).

In *United States v. Freeman*, ___ F.3d ___, 2000 FED App. 0102P (6th Cir. March 23, 2000), Judge Clay observed "a troubling pattern or practice by some members of the Shelby County Sheriff's Department drug interdiction squad of stopping 'target' vehicles on questionable probable cause grounds... in order to search for contraband." The Fifth Circuit's opinion in *Atwater* would make such practices even more pervasive as the quantum of suspicion required for the stop would alone justify the search.

The Fifth Circuit's opinion licenses the search of virtually every car on the road where the state's interest consists merely of ensuring the motorist pays a small fine and where institutional pressures encourage the officer to perform a full-scale arrest despite the minimal infraction.

CONCLUSION

The decision of United States Court of Appeals for the Fifth Circuit misconstrued this Court's precedent regarding limitations on the manner of seizure an officer may perform once he has probable cause. The Fifth Circuit's opinion highlights a diversity of approaches taken to the question of an officer's authority to perform a misdemeanor arrest. The federal constitution forbids a misdemeanor arrest for driving without a seat belt in California, but not Texas. Vast degrees of officer discretion to decide whether a fine-only misdemeanor warrants an arrest are permitted in some states, but not others. This Court should grant certiorari to determine whether the citizenry may have their liberty subjected to the discretion of officers with the power to arrest for any offense -- a power they now have in some jurisdictions, but not others.

Respectfully submitted,

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In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS as next friend of Anya Savannah Haas and Mackinley Xavier Haas,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

U.S. District Court
Western District of Texas (Austin)

9/12/97	–	Case assigned to Honorable Sam Sparks (mcl) [Entry date 09/16/97]
9/12/97	1	Notice for Removal Filing Fee: $150.00 Receipt # 259256 (mcl) [Entry date 09/16/97]
9/12/97	2	Advisory to the court filed by City of Lago Vista, Bart Turek, Frank Miller in re: no motions are pending in the 98th Judicial District Court of Travis County, Texas prior to the removal (mcl) [Entry date 09/16/97]
9/16/97	–	Court file prepared and forwarded to Judge Sparks. (mcl)
9/22/97	3	Order to supplement record. (xc 9.22.97) (mcl)
10/2/97	4	Response by City of Lago Vista, Bart Turek, Frank Miller order [3-1] "Notice of Compliance With Order to Supplement Record" (mcl) [Entry date 10/03/97]

* * *

10/21/97	8	Scheduling order setting Joining of parties, amending of pleadings on 2/20/98 Deadline for filing of all motions 5/7/98 Discovery cutoff 4/20/98 Pretrial order to be submitted on or before 5/22/98; Docket Call set for 11:00 5/29/98; Alternate Dispute Resolution Report due by 12/22/97 m p (mcl) [Entry date 10/22/97]

* * *

11/13/97 11 Motion by Gail Atwater, Michael Haas for leave to file amended complaint (mcl) [Entry date 11/14/97]

11/18/97 12 Second Amended complaint by Gail Atwater, Michael Haas, amending (Pages: 12) (mcl)

* * *

12/1/97 16 Order denying renewed motion to remand [13-1], striking amended complaint [12-1], denying motion for leave to file amended complaint [11-1]. (mailed 12/2/97) (td) [Entry date 12/02/97]

* * *

12/12/97 – RECEIVED Defendant's Motion to Dismiss . . . (td)

* * *

12/18/97 19 Motion by City of Lago Vista, Bart Turek, Frank Miller with memorandum in support to dismiss, or in the alternative for summary judgment (mcl)

* * *

12/24/97 21 Motion by Gail Atwater, Michael Haas to extend time to respond to Defendants' 12(b) (6) motion to dismiss or, in the alternative, Rule 56 motion and brief for summary judgment (mc2)

* * *

12/30/97 24 Order granting motion to extend time to respond to Defendants' 12(b) (6) motion to dismiss or, in the alternative, Rule 56 motion and brief for summary judgment

[21-1], response is due 1/15/98. (xc 12.30.97) (mcl)

12/31/97 25 Response by City of Lago Vista, Bart Turek, Frank Miller in opposition to motion to extend time to respond to Defendants' 12(b) (6) motion to dismiss or, in the alternative, Rule 56 motion and brief for summary judgment [21-1] (td) [Entry date 01/02/98]

* * *

1/8/98 27 Order setting hearing on all pending matters for 3:00 on 1/26/98. – (FAXED on 1/8/98) (kc)

1/15/98 28 Objections to and Motion by Gail Atwater, Michael Haas to strike portions of the affidavit of Frank Miller (mcl) [Entry date 01/16/98]

* * *

1/15/98 – RECEIVED, Plaintiffs' Cross-Motion for Partial Summary Judgment and Response to City of Lago Vista Defendants' Motion to dismiss or in the alternative for Summary Judgment (mcl) [Entry date 01/16/98]

* * *

1/16/98 31 Cross motions by Gail Atwater, Michael Haas for partial summary judgment (mcl) [Entry date 01/20/98]

1/16/98 31 Response by Gail Atwater, Michael Haas motion to dismiss [19-1], motion for summary judgment [19-2] (mcl) [Entry date 01/20/98]

* * *

1/26/98	–	RECEIVED, defendants' reply to plaintiff's response to defendants' rule 12(b)(6) motion to dismiss . . . (mcl)
1/26/98	33	Response by City of Lago Vista, Bart Turek, Frank Miller motion to strike portions of the affidavit of Frank Miller [28-1] (mcl)
1/26/98	34	Response by City of Lago Vista, Bart Turek, Frank Miller cross motion for partial summary judgment [31-1] (mcl)
1/26/98	–	Miscellaneous hearing (pending matters) held. Parties announce ready. Statements and arguments of counsel heard. Motion for summary judgment [19-2] granted. Plaintiff has 10 days to file any pleading he desires before final judgment. Written order forthcoming in 10 days. (td) [Entry date 01/27/97]
2/3/98	35	Transcript filed for dates of 1/26/98 (mcl)
2/10/98	36	Motion by Michael Haas for voluntary dismissal with prejudice (td)
2/10/98	37	Order set miscellaneous hearing for 8:30 2/13/98 (faxed 2/10/98) (td)
2/10/98	38	Response by City of Lago Vista, Bart Turek, Frank Miller to motion for voluntary dismissal with prejudice [36-1] (td)
2/10/98	38	Motion by City of Lago Vista, Bart Turek, Frank Miller for entry of judgment (td)
2/13/98	39	Order granting motion to dismiss [19-1], granting motion for summary judgment [19-2] mooting motion for entry of judgment [38-1], mooting motion for voluntary dismissal with prejudice [36-1], mooting motion for leave to file reply in excess of 10 pages [32-1], denying cross motion for partial summary judgment [31-1], mooting motion to strike portions of the affidavit of Frank Miller [28-1] (xc 2.13.98) (mcl)
2/13/98	40	Judgment for City of Lago Vista, Bart Turek, Frank Miller against Gail Atwater, Michael Haas (Pages: 1) IT IS ORDERED that Gail Atwater and Michael Hass [sic], as next friend of Anya Savannah Hass [sic] and Mackinley Xavier Haas take nothing by their causes of action asserted against the City of Lago Vista, Bart Turek, and Frank Miller and that all costs be taxed to the plaintiffs. (xc 2.13.98) (mcl)
2/13/98	–	Case closed (mcl)
2/13/98	41	Motion by Gail Atwater, Michael Haas for reconsideration of oral ruling granting defendants' motion for summary judgment (mcl)
2/18/98	42	Order denying motion for reconsideration of oral ruling granting defendants' motion for summary judgment [41-1] (xc 2.19.98) (mcl) [Entry date 02/19/98]

* * *

3/19/98	48	Notice of appeal by Gail Atwater, Michael Haas (mcl)
3/19/98	–	USCA appeal fees paid for appeal [48-1] : Appeal Fee: $105.00 Receipt # 269558 (mcl)

3/26/98 – Served copy of notice of appeal and transmittal letter to the Fifth Circuit on Pamela McGraw, William Krueger, and Court. (sl)

3/26/98 – Certified and transmitted record on appeal to U.S. Court of Appeals: appeal [48-1] (sl)

Fifth Circuit Court of Appeals

4/3/98 Civil rights case docketed. NOA filed by Appellant Gail Atwater, Appellant Michael Haas. [98-50302] (mcs)

4/3/98 Record on appeal filed. Pleadings: 4 vols. Transcripts: 1 vol. [98-50302] (sep)

4/6/98 Briefing notice issued. [98-50302] A/Pet's Brief due on 5/18/98 for Michael Haas, for Gail Atwater. (sep)

4/20/98 Appearance form filed by Debra Irwin for Appellant Michael Haas, Appellant Gail Atwater, Pamela Ann McGraw for Appellant Michael Haas, Appellant Gail Atwater. [98-50302] (jca)

4/20/98 Appearance form filed by Robert Charles DeCarli for Appellant Michael Haas, Appellant Gail Atwater. [98-50302] (jca)

* * *

5/20/98 Appellant's Brief filed by Appellant Gail Atwater, Appellant Michael Haas. Copies of brief: 7 # of pages: 30. Date of COS: 5/18/98 Sufficient [Y/N]: y. [98-50302] A/Pet's Brief ddl satisfied. E/Res's Brief

due on 6/19/98 for Frank Miller, for Bart Turek, for Lago Vista, City of (jtr)

5/20/98 Record excerpts filed by Appellant Gail Atwater, Appellant Michael Haas # of copies: 4 Sufficient [Y/N]: y. [98-50302] (jtr)

5/21/98 Appearance form filed by Joanna Rae Lippman for Appellee Frank Miller, Appellee Bart Turek, Appellee Lago Vista, City of, William W Krueger for Appellee Frank Miller, Appellee Bart Turek, Appellee Lago Vista, City of. [98-50302] (jca)

* * *

6/22/98 Appellee's Brief filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller. Copies of Brief: 7 # of pages: 28. Date of COS: 6/19/98 Sufficient [Y/N]: Y. [98-50302- E/Res's Brief ddl satisfied. Reply Brief due on 7/6/98 for Michael Haas, for Gail Atwater. (sep)

6/22/98 Record excerpts filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller # of copies: 4 Sufficient [Y/N]: N, excess pages, [98-50302] Sufficient Record Excerpts due on 7/3/98 for Frank Miller, for Bart Turek, for Lago Vista, City of (sep)

7/6/98 Record Excerpts made sufficient by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller [98-50302] Sufficient Record Excerpts ddl satisfied, (sep)

7/7/98 Reply brief filed by Appellant Gail Atwater, Appellant Michael Haas. Copies of

	Brief: 7 # of pages: 15. Date of COS: 7/3/98 Sufficient [Y/N]: Y. [98-50302] Reply Brief ddl satisfied. (sep)
9/8/98	Case tentatively calendared for oral argument Week of: 11/02/98. [98-50302] (gam)
9/18/98	Case calendared for oral argument. [98-50302] (sme)
11/5/98	Oral argument heard. Case argued by Joanna Rae Lippman for Appellee Frank Miller, Appellee Bart Turek, Appellee Lago Vista, City of, Pamela Ann McGraw for Appellant Michael Haas, Appellant Gail Atwater [98-50302] (sme)
11/6/98	Supplemental authorities (FRAP 28(j)) filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller [1107242-1] . [98-50302] (sme)
11/16/98	Letter referencing oral argument of 11/5/98, filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller [1115971-1] [98-50302] (rff)
1/29/99	Opinion filed. If Published # of pages: 10 Issue Mandate due on 2/19/99. [98-50302] (jma)
1/29/99	Judgment entered and filed. [98-50302] (jma)
1/29/99	Costs taxed specifically against the City of Lago Vista and Officer Turek. Copies to counsel. [1178752-1] [98-50302] (jma)
2/11/99	Petition filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller for rehearing. # of copies filed: 4 [1191813-1] [98-50302] (swt)

2/11/99	Petition filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller for rehearing en banc. # of copies filed: 20 [1191823-1] Sufficient Rehearing due on 2/17/99 for Frank Miller, for Bart Turek, for Lago Vista, City of. [98-50302] (swt)
2/12/99	Bill of costs filed by Appellant Gail Atwater, Appellant Michael Haas. [1192942-1] [98-50302] (rff)
2/18/99	Rehearing made sufficient by Appellant Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller [98-50302] Sufficient Rehearing ddl satisfied. (swt)
2/19/99	Record on appeal returned to 5CCA. Volumes: 5 [98-50302] (vlb)
3/26/99	COURT Order filed granting petition for rehearing en banc [1191823-1] with Argument (Y/N)? y Before: All Active Judges and Judge Reynaldo G. Garza. A/Pet Supplemental Brief due on 4/28/99 for Michael Haas, for Gail Atwater. E.Res Supplemental Brief due on 5/28/99 for Frank Miller, for Turek, for Lago Vista, City of; mooting petition for rehearing [1191813-1] Copies to all counsel. [98-50302] (gam)
3/26/99	Case reopened. [98-50302] (gam)
3/26/99	Case tentatively calendared for en banc oral argument Week of: 09/20/99. [98-50302] (gam)
4/1/99	Record on appeal returned to 5CCA. Volumes: 5 [98-50302] (swt)

4/29/99	Supplemental brief filed by Appellant Gail Atwater, Appellant Michael Haas. Copies of Brief: 20 # of pages: 24. Word count: 5282 Disk Provided [Y/N]: y Date of COS: 4/28/99 [98-50302] A/Pet Supplemental Brief ddl satisfied. (hjg)
6/1/99	Supplemental brief filed by Appellee Lago Vista, City of, Appellee Bart Turek, Appellee Frank Miller, Copies of Brief: 20 # of pages: 17. Word count: 4038 Dist Provided [Y/N]: n Date of COS: 5/28/99 [98-50302] E/Res Supplemental Brief ddl satisfied. (hjg)
6/7/99	Motion filed by Texas Municipal League and Texas City Attorneys Association to file amicus brief [1303104-1] Excess Pages? (Y/N) n [98-50302] (rff)
6/7/99	Motion filed by Texas Police Chiefs Association to file amicus brief [1303107-1] Excess Pages? (Y/N) n [98-50302] (rff)
6/11/99	Response/opposition filed by Appellant Gail Atwater, Appellant Michael Haas to motion to file amicus brief [1303104-1], motion to file amicus brief [1303107-1] Excess Pages? (Y/N) n [1305938-1] [98-50302] (rff)
6/16/99	Reply filed by Not Party TX Muni Leag, Not Party TX City Atty Assn to response/opposition [1305938-1] Excess Pages? (Y/N) n [1310917-1] [98-50302] (rff)
6/18/99	COURT Order filed granting the motion of Texas Municipal League and Texas City Attorneys Association to file an amicus brief [1303104-1], granting the motion of the Texas Police Association to file an amicus brief [1303107-1] (CDK) Copies to all counsel. [98-50302] (mcs)
6/18/99	Amicus curiae brief filed by Amicus Curiae TX Muni Leag, Amicus Curiae TX City Atty Assn. Consent included in brief? [Y/NA] NA Copies of Brief: 7 # of pages: 8 Date of COS: 6/4/99 Sufficient [Y/N]: n No appearance form. [98-50302] Sufficient Brief due on 6/28/99 for TX City Atty Assn, for TX Muni Leag. (hjg)
6/18/99	Amicus curiae brief filed by Amicus Curiae TX Police Chiefs. Consent included in brief? [Y/NA] NA Copies of Brief: 7 # of pages: 12 Date of COS: 6/4/99 Sufficient [Y/N]: n Wrong color cover, No appearance form. [98-50302] Sufficient Brief due on 6/28/99 for TX Police Chiefs. (hjg)
6/30/99	Appearance form filed by Monte Akers for Amicus Curiae TX City Atty Assn, Amicus Curiae TX Muni Leag. [98-50302] Sufficient Brief ddl satisfied. (swt)
7/15/99	Appearance form filed by James McLaughlin for Amicus Curiae TX Police Chiefs. [98-50302] Sufficient Brief ddl satisfied. (swt)
7/15/99	Brief made sufficient by Amicus Curiae TX Police Chiefs (appearance form received) Replacement Disk Provided [Y/N]: n [98-50302] (swt)
9/22/99	Oral argument heard En Banc. Case argued by Robert Charles DeCarli for Appellant Michael Haas, Appellant Gail Atwater, William W Krueger for Appellee Frank Miller, Appellee Bart Turek, Appellee Lago Vista, City of [98-50302] (vlb)

11/24/99	Opinion filed. If Published # of pages: 4 Issue Mandate due on 12/15/99. [98-50302] (jma)
11/24/99	Judgment entered and filed. [98-50302] (jma)
12/16/99	Mandate issued. Approved BOC Issued [Y/N]?: Y [98-50302] Issue Mandate ddl satisfied. (sds)
1/3/00	Record on appeal returned to 5CCA. Volumes: 5 [98-50302] (jca)
1/3/00	Record on appeal returned to USDC. Volumes: 5. [98-50302] (jca)
2/29/00	Supreme Court notice that petition for certiorari was filed on 02/22/00 by Appellant Gail Atwater and Appellant Michael Haas. Supct No.: 99-1408 [98-50302] (cav)
6/30/00	Supreme Court order received granting petition certiorari [1555313-1] by Appellant Gail Atwater, Michael Haas on 6/26/00. [98-50302] (ksw)
8/30/00	Record on appeal requested from the district court for the Supreme Court [98-50302] . (ksw)
8/30/00	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Volumes: 2 [98-50302] (ksw)

CAUSE NO. 97-09063

GAIL ATWATER, INDIVIDUALLY, and MICHAEL HAAS, M.D., as Next Friend of Anya Savannah Haas and Mackinley Xavier Haas, Plaintiffs,	§	**IN THE DISTRICT COURT**
	§	**98th JUDICIAL DISTRICT**
v.	§	**TRAVIS COUNTY, TEXAS**
THE CITY OF LAGO VISTA, BART TUREK; and FRANK MILLER, Defendants	§	

§§§

I.

PARTIES

1. Named Plaintiffs GAIL ATWATER and MICHAEL HAAS are individuals residing in Lago Vista, Travis County, Texas; Plaintiffs are husband and wife, their minor children, actual parties in interest, are ANYA SAVANNAH HAAS, now age 6, and MACKINLEY XAVIER HAAS, now age 4; Plaintiff MICHAEL HAAS is qualified to serve and is not disqualified from serving as Next Friend of his minor children.

2. Defendant THE CITY OF LAGO VISTA is a municipality located [sic] Travis County, Texas, and may be served with process by serving the current mayor, Glen Hartman, at 5803 Thunderbird, Lago Vista, Travis County, Texas 78645.

3. Defendant BART TUREK is, and at all times mentioned was, a resident of the City of Lago Vista, Travis County, Texas. At all times relevant to this action, Defendant BART TUREK was a duly appointed and acting Police Officer appointed by The City of Lago Vista Police Department. Defendant BART TUREK may be served with process at The City of Lago Vista Police Department, 7207 Bar K Ranch Road, Lago Vista, Travis County, Texas 78645.

4. Defendant FRANK MILLER was, at all times relevant to this action, the Chief of Police for the City of Lago Vista Police Department. FRANK MILLER may be served with process at The City of Lago Vista Police Department, 7207 Bar K Ranch Road, Lago Vista, Travis County, Texas 78645.

5. The City of Lago Vista has actual notice, pursuant to all relevant statutes.

II.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the controversy because it is within the jurisdictional limits of this Court.

7. This Court has jurisdiction over the Defendants in this matter because all defendants are residents of the State of Texas.

8. Venue is proper in Travis County because the [sic] all defendants either currently reside in Travis County, or resided in Travis County at the time the causes of action accrued, and because all of the events giving rise to the Plaintiffs' allegations occurred in Travis County.

III.

CLASS ALLEGATIONS

9. This action is brought by Plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Texas Rule of Civil Procedure 42 (a) and Texas Rule of Civil Procedure 42 (b)(4).

10. The class so represented by Plaintiffs in this action, and of which Plaintiffs are members, consists of persons who have been subjected to detainment without probable cause, false arrests, false imprisonments, malicious prosecution, and/or excessive use of force, by police officers employed by the City of Lago Vista Police Department,

who, at all times relevant to this action, were acting under color of law, or as a result of a municipal policy, or as a result of custom and/or usage of such policy.

11. The exact number of class members, here identified and described, is not known, but it is estimated that there are no less than 500. The class is so numerous that joinder of individual members is impractical. Plaintiffs allege and will show that many people who live in or visit Lago Vista live in fear and distrust of the Lago Vista Police Department.

12. There are common questions of law and fact in the action that relate to affect the rights of each member of the class, and the relief sought is common to the entire class. The common questions of law and fact pertain to arrest, detainment and/or seizure of individuals without probable cause or exigent circumstances, unlawful search and seizure, false arrest, false imprisonment, malicious prosecution, and/or excessive use of force, by one or more police officers employed by the City of Lago Vista Police Department and supervised by either the current or former Chief of Police and by other officials and agents of the City of Lago Vista, including but not limited to the mayor, the city attorney, and the city manager. At all times relevant to this action, the police officers were acting under color of law, or as a result of a municipal policy, or as a result of custom and/or usage of such policy.

13. The claims of Plaintiffs, who are representatives of the class here, are typical of the claims of the class, in that the claims of all members of the class, including Plaintiffs, depend on the showing of the acts or omissions of

Defendants giving rise to the right of Plaintiffs to the relief sought herein. The named Plaintiffs do not know and are unaware of any conflict between themselves and other members of the class designated with respect to this action, or with respect to the claims for relief set forth herein.

14. This action is properly maintained as a class action inasmuch as the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

15. The named Plaintiffs are the representative parties for the class, and are able to, and will, fairly and adequately protect the interests of the class. Charles Edward Lincoln, attorney for Plaintiffs, has experience in and knowledge of the field of civil rights litigation, both as a judicial law clerk in the United States District Court for the Southern District of Florida, as an extern for the United States Court of Appeals for the Ninth Circuit, and as an associate of other law firms. Charles Edward Lincoln will actively conduct and be responsible for Plaintiffs' case here.

IV.

ALTERNATIVE CLASS ALLEGATIONS

16. This action is brought by Plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Texas Rule of Civil Procedure 42 (a) and Texas Rule of Civil Procedure 42 (b)(4).

17. The class so represented by Plaintiffs in this action, and of which Plaintiffs are members, consists of persons who have been subjected to detainment without probable cause, false arrests, false imprisonments, malicious prosecution, and/or excessive use of force, by Defendant BART TUREK and other police officers employed by the City of Lago Vista Police Department, who, at all times relevant to this action, were acting under color of law, or as a result of a municipal policy, or as a result of custom and/or usage of such policy.

18. The exact number of class members, here identified and described, is not known, but it is estimated that there are not less than 100, and there may be as many as 500. The class is so numerous that joinder of individual members is impractical. Plaintiffs allege and will show that many people who live in or visit Lago Vista live in fear and distrust of the Lago Vista Police Department.

19. There are common questions of law and fact in the action that relate to affect the rights of each member of the class, and the relief sought is common to the entire class. The common questions of law and fact pertain to the employment of violent, emotionally unstable, and psychologically imbalanced individuals as police officers, who commit false arrests, detainments and/or seizures of individuals without probable cause or exigent circumstances, unlawful search and seizure, false arrest, false imprisonment, malicious prosecution, and/or excessive use of force. Defendant BART TUREK appears to be the single police officer employed by the City of Lago Vista Police Department who has harmed the greatest number of individuals, according to present information and belief. Nonetheless, the police department as a whole

supervised by either the current or former Chief of Police and by other officials and agents of the City of Lago Vista, including but not limited to Defendant FRANK MILLER (police chief) the mayor, the city attorney, and the city manager, have all fostered and encouraged and condoned behavior such as BART TUREK's as a matter of municipal policy. At all times relevant to this action, BART TUREK and the other LAGO VISTA police officers complained of were acting under color of law, or as a result of a municipal policy, or as a result of custom and/or usage of such policy.

20. The claims of Plaintiffs, who are representatives of the class here, are typical of the claims of the class, in that the claims of all members of the class, including Plaintiffs, depend on the showing of the acts or omissions of Defendants giving rise to the right of Plaintiffs to the relief sought herein. The named Plaintiffs do not know and are unaware of any conflict between themselves and other members of the class designated with respect to this action, or with respect to the claims for relief set forth herein.

21. This action is properly maintained as a class action inasmuch as the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, in that the plaintiffs in this class desire reform in the police department and that the offending officers and the Police Chief be disciplined and dismissed. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, in that all plaintiffs can be heard together, and it will be easier through this mechanism to

locate all who have been affected by the City's intentional policies and gross negligence.

22. The named Plaintiffs are representative parties for the class, and are able to, and will, fairly and adequately protect the interests of the class. Charles Edward Lincoln, attorney for Plaintiffs, has experience in and knowledge of the field of civil rights litigation, both as a judicial law clerk in the United States District Court for the Southern District of Florida, as an extern for the United States Court of Appeals for the Ninth Circuit, and as an associate of other law firms. Charles Edward Lincoln will actively conduct and be responsible for Plaintiffs' case here.

V.

FACTS OF NAMED PLAINTIFFS' CLAIM WHICH MAY BE TYPICAL OF CLASS MEMBERS

23. On or about March 26, 1997, Plaintiff GAIL ATWATER, accompanied by her two minor children, ANYA SAVANNA HAAS AND MACKINLEY XAVIER HAAS, was driving on the public streets of the City of Lago Vista, when Defendant BART TUREK stopped her for not having her children properly seatbelted in the vehicle.

24. As Defendant BART TUREK approached Plaintiff GAIL ATWATER's car, he began yelling at her, using words to the effect, "We've met before!" He then proceeded to stick his finger in her face and state "You're going to jail!" Plaintiff GAIL ATWATER's first words to Defendant BART TUREK were "Please don't yell," as his rude approach and loud, abusive voice were frightening her children, at that time aged 5 and 3.

25. Defendant BART TUREK called for back up, and then asked for Plaintiff GAIL ATWATER'S driver's license and insurance information. As Plaintiff's purse had been stolen the day before, she told Defendant BART TUREK that she did not have them with her. Defendant BART TUREK only laughed at her, using words to the effect of "I've only heard that story two-hundred times."

26. Because her children were frightened, upset and crying, Plaintiff GAIL ATWATER asked Defendant BART TUREK if she could take her kids to her friend's home, which was approximately two houses from where Defendant BART TUREK stopped her. Defendant BART TUREK replied, "You're not going anywhere. You don't care about these kids or you would have had them in seatbelts!" By this time, Plaintiff GAIL ATWATER'S friend, who had been alerted to the situation by bystanders, walked up and took the children to her house.

27. At this point, Defendant BART TUREK continued to yell at and browbeat Plaintiff GAIL ATWATER, by making statements such as "You just had to get these kids in a car and go somewhere, didn't you! You couldn't walk! Why didn't you get your girlfriend to come get you?! You're going to jail!" He then handcuffed Plaintiff GAIL ATWATER and took her to jail, where she spent approximately one hour. Plaintiff GAIL ATWATER'S vehicle, which was parked only two houses from her friend's house, was towed to Cedar Park. At no time was Plaintiff GAIL ATWATER informed that she was under arrest, nor did Defendant BART TUREK inform Plaintiff GAIL ATWATER of her "Miranda" rights. Plaintiff's person was thus unreasonably and unlawfully seized, in violation of the Fourth and Fifth Amendments to the United States

Constitution, incorporated to the States by the Fourteenth Amendment to the United States Constitution. The Defendants seized Plaintiff without due process or probable cause, also in violation of the Fifth and Fourteenth Amendments.

VI.

FIRST CAUSE OF ACTION: DEPRIVATION OF CONSTITUTIONAL RIGHTS

28. Paragraphs (1)-(27) of this First Amended Petition are incorporated by reference into this section as if fully set forth herein.

29. Plaintiff GAIL ATWATER, individually, and Plaintiff MICHAEL HAAS, M.D., as Next Friend his minor children ANYA SAVANNAH HAAS and MICHAEL XAVIER HAAS, do hereby sue and bring this action on behalf of themselves and others similarly situated against Defendants THE CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER for deprivation of constitutional rights within the meaning of 42 U.S.C. §1983.

30. At all relevant times, Defendants BART TUREK and FRANK MILLER were the agents, servants, and/or employees of Defendant THE CITY OF LAGO VISTA. At all relevant times, Defendant FRANK MILLER supervised Defendant BART TUREK as part of his duties as Police Chief of the City of Lago Vista Police Department.

31. The above-described actions subjected Plaintiffs to a deprivation of rights, privileges and immunities secured to Plaintiffs by the Constitution and/or laws of the United States, including the due process clause of the

Fifth and Fourteenth Amendment to the Constitution of the United States, within the meaning of 42 U.S.C. §1983, and the right to be free from unreasonable seizure provided by the Fourth Amendment, incorporated to the States by the Fourteenth Amendment.

32. As a direct and proximate result of the above-mentioned unconstitutional acts of Defendants THE CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, sustained emotional and psychological injuries, as well as loss of time, inconvenience, the cost of towing her vehicle, and other costs and damages. In all likelihood, as a direct and proximate result of the above described actions of these Defendants, Plaintiffs will continue to suffer emotional distress and mental anguish well into the future.

VII.

SECOND CAUSE OF ACTION: EXCESSIVE USE OF FORCE

33. Paragraphs (1)-(32) of this First Amended Petition are hereby realleged and incorporated by reference as if fully copied and set forth herein.

34. Plaintiff GAIL ATWATER, individually, and Plaintiff MICHAEL HAAS, M.D., as Next Friend of his minor children ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS, on behalf of themselves and of all Plaintiffs similarly situated, do hereby sue and bring this cause of action against Defendants THE CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER for deprivation of

constitutional rights within the meaning of 42 U.S.C. §1983.

35. As described in detail above, Defendant BART TUREK used excessive force in arresting Plaintiff GAIL ATWATER during the course of a routine traffic stop. Such force was in no manner or way necessary to conduct this traffic stop or to restrain Plaintiff GAIL ATWATER, nor were there any other exigent or extenuating circumstances.

36. At all times relevant to the incident in question, Defendant BART TUREK was acting within the course and scope of his employment and authority as a police officer for Defendant THE CITY OF LAGO VISTA.

37. Defendant's actions, as describe [sic] above, deprived Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, and MACKINLEY XAVIER HAAS, of equal protection of the law, and other rights, privileges and immunities protected by the United States Constitution and/or other laws. As such, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, and MACKINLEY XAVIER HAAS, are entitled to recover their actual, consequential, and special damages from Defendants BART TUREK and the CITY OF LAGO VISTA, pursuant to 42 U.S.C. §1983, 42 U.S.C. §1985, and 42 U.S.C. §1988.

38. Additionally, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, are entitled to recover against Defendants BART TUREK and THE CITY OF LAGO VISTA pursuant to the Texas Tort Claims Act, Texas Civil Practice and Remedies Code, §101.001 et seq.

39. In committing the acts alleged above, Defendant BART TUREK either acted intentionally, recklessly, wantonly and/or with malice toward Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, thus entitling Plaintiffs to an award of exemplary damages. Defendant BART TUREK's actions were not the result of mere momentary thoughtlessness or inattention, but constituted that kind of conduct for which the law provides punishment.

VIII.

THIRD CAUSE OF ACTION: FALSE IMPRISONMENT

40. Paragraphs (1)-(39) of this First Amended Petition are hereby realleged and incorporated by reference as if fully copied and set forth herein.

41. Plaintiff GAIL ATWATER, individually, and Plaintiff MICHAEL HAAS, M.D., as Next Friend of his minor children ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS, on their own behalf and on behalf of all persons similarly situated, do hereby sue and bring this cause of action against Defendants THE CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER for deprivation of constitutional rights within the meaning of 42 U.S.C. §1983.

42. As described in detail above, Defendant BART TUREK stopped Plaintiff GAIL ATWATER for not having her children properly restrained in the car, and then proceeded to wrongfully seize her, without reading her the required Miranda warnings, for the traffic violation. Although Plaintiff GAIL ATWATER was never told she

was under arrest, Defendant BART TUREK placed her under restraint by physical force and show of authority, thus completely restricting her freedom of movement. At no time during this wrongful seizure was Plaintiff GAIL ATWATER free to leave, or even to make adequate provisions to take care of her children. At no time in question did Plaintiff GAIL ATWATER commit an offense justifying an arrest.

43. At all relevant times, Defendants BART TUREK and FRANK MILLER were the agents, servants, and/or employees of Defendant THE CITY OF LAGO VISTA. At all relevant times, Defendant FRANK MILLER supervised Defendant BART TUREK as part of his duties as Police Chief of the City of Lago Vista Police Department.

44. The facts alleged above were committed under the direction of Defendants FRANK MILLER and THE CITY OF LAGO VISTA, with the knowledge and consent of these Defendants, as part of a pattern and practice of these Defendants pursuant to municipal policy, and/or were thereafter approved and ratified by these Defendants.

45. The above-described actions subjected Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, to a deprivation of rights, privileges and immunities secured to Plaintiff by the Constitution and/or laws of the United States, including the right to be free from unreasonable seizure and the rights provided by the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States, within the meaning of 42 U.S.C. §1983.

46. As a direct and proximate result of the above-mentioned illegal and unconstitutional acts of Defendants THE CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS sustained emotional and psychological injuries, as well as loss of time, inconvenience, the costs of retrieving her wrongfully towed car, and other costs and damages. In all likelihood, as a direct and proximate result of the above described actions of these Defendants, Plaintiff will continue to suffer mental anguish well into the future.

IX.

FOURTH CAUSE OF ACTION: INADEQUATE TRAINING

47. Paragraphs (1)-(46) of this First Amended Petition are hereby realleged and incorporated by reference as if fully copied and set forth herein.

48. This Cause of Action is brought by Plaintiffs GAIL ATWATER, individually, and MICHAEL HAAS, M.D., as Next Friend of his minor children ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS, on their own behalf and on behalf of all persons similarly situated, against Defendants THE CITY OF LAGO VISTA and FRANK MILLER for deprivation of constitutional rights within the meaning of 42 U.S.C. §1983. Additionally, Plaintiffs bring this cause of action pursuant to the Texas Tort Claims Act, Texas Civil Practice and Remedies Code, §101.001 et. seq.

49. At all times relevant to this complaint, Defendants THE CITY OF LAGO VISTA and FRANK MILLER had a

duty properly to train and instruct the police officers working for The City of Lago Vista Police Department. Defendants THE CITY OF LAGO VISTA'S and FRANK MILLER'S actions in failing properly to train these officers, including Defendant BART TUREK, constitute negligence and/or gross negligence. As a result, Defendants THE CITY OF LAGO VISTA and FRANK MILLER directly and proximately caused the injuries to Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS.

50. The above-described actions subjected Plaintiffs to a deprivation of rights, privileges and immunities secured to Plaintiffs by the Constitution and/or laws of the United States, including the right to be free from unreasonable seizure secured by the Fourth Amendment and the rights provided by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, within the meaning of 42 U.S.C. §1983.

51. As a direct and proximate result of the above-mentioned unconstitutional acts of Defendants THE CITY OF LAGO VISTA and FRANK MILLER, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, sustained emotional and psychological injuries, as well as loss of time, inconvenience, the costs of wrongfully towing her car, and other and further costs and damages. In all likelihood, as a direct and proximate result of the above described actions of these Defendants, Plaintiffs will continue to suffer mental anguish well into the future.

X.

FIFTH CAUSE OF ACTION: FAILURE TO SUPERVISE

52. Paragraphs (1)-(51) are hereby realleged and incorporated by reference as if fully copied and set forth herein.

53. This Cause of Action is brought by Plaintiff GAIL ATWATER, individually, and MICHAEL HAAS, M.D., as Next Friend of his minor children ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS, on behalf of themselves and of all persons similarly situated, against Defendants THE CITY OF LAGO VISTA and FRANK MILLER for deprivation of constitutional rights within the meaning of 42 U.S.C. §1983. Additionally, Plaintiffs bring this cause of action pursuant to the Texas Tort Claims Act, Texas Civil Practice and Remedies Code, §101.001 et. seq.

54. At all times relevant to this Complaint, Defendant FRANK MILLER was responsible for supervising Defendant BART TUREK. Furthermore, at all times relevant to this complaint, Defendant FRANK MILLER acted as the agent, servant, or employee of Defendant THE CITY OF LAGO VISTA.

55. Defendant FRANK MILLER had a duty, as Chief of Police, properly to supervise the police officers working for The City of Lago Vista Police Department, including Defendant BART TUREK, to prevent the police officers from violating the constitutional rights of the citizens of Lago Vista.

56. Defendant FRANK MILLER was negligent and/or grossly negligent in fulfilling his duty to properly supervise the police officers of the City of Lago Vista Police Department, including Defendant BART TUREK. Said negligence and gross negligence constituted a pattern or practice on the part of Defendant FRANK MILLER.

57. Defendant THE CITY OF LAGO VISTA, although aware of Defendant FRANK MILLER'S improper supervision of the police officers under his command, failed to take any corrective action. Said actions by Defendant THE CITY OF LAGO VISTA constitute negligence and gross negligence.

58. The above-described actions subjected Plaintiffs to a deprivation of rights, privileges and immunities secured to Plaintiffs by the Constitution and/or laws of the United States, including the right to be free from unreasonable seizure secured by the Fourth Amendment and the rights secured by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, within the meaning of 42 U.S.C. §1983.

59. As a direct and proximate result of the above-mentioned unconstitutional acts of Defendants THE CITY OF LAGO VISTA and FRANK MILLER, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, sustained emotional and psychological injuries, as well as loss of time and inconvenience, the costs of retrieving her wrongfully towed automobile, and other and further costs and damages. In all likelihood, as a direct and proximate result of the above described actions of these Defendants, Plaintiffs will continue to suffer mental anguish well into the future.

XI.

SIXTH CAUSE OF ACTION: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

60. Paragraphs (1)-(59) above are incorporated by reference as if fully set forth herein.

61. This Cause of Action is brought by Plaintiff' GAIL ATWATER, INDIVIDUALLY, AND MICHAEL HAAS, M.D., AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS, on behalf of themselves and of all persons similarly situated, against the Defendants CITY OF LAGO VISTA, BART TUREK, and FRANK MILLER, for intentional infliction of emotional distress pursuant to the Texas Tort Claims Act, Texas Civil Practice and Remedies Code, §101.001 et. seq., and the common law of the State of Texas.

62. At all relevant times, Defendants BART TUREK and FRANK MILLER were the agents, servants, and/or employees of Defendant THE CITY OF LAGO VISTA. At all relevant times, Defendant FRANK MILLER supervised Defendant BART TUREK as part of his duties as Police Chief of the City of Lago Vista Police Department.

63. Defendant BART TUREK acted intentionally or recklessly by harassing, humiliating, browbeating, handcuffing, and improperly forcing Plaintiff GAIL ATWATER to go to the Lago Vista Police Station, and by violating Plaintiff GAIL ATWATER'S civil rights as discussed above. Furthermore, he terrorized her children ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS by unjustly and unreasonably screaming at their mother in front of them, all the while knowing how much this upset the children; suggesting, in front of the children, that

their mother did not care about them; and threatening to take their mother to jail in front of them. He additionally traumatized them by not allowing Plaintiff GAIL ATWATER to remove her children from this frightening situation when she reasonably asked if she could do so. Said conduct was extreme and outrageous, especially for officers sworn to uphold the law and protect the citizens of this State, and should be regarded as atrocious and utterly intolerable in a civilized community. His actions directly and proximately caused Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, to suffer severe emotional distress, for which they are entitled to recover damages.

64. Defendants THE CITY OF LAGO VISTA and FRANK MILLER acted intentionally or recklessly in the manner in which they supervised and/or trained their police officers, including Defendant BART TUREK. These Defendants knew of and/or condoned the reprehensible acts committed by several police officers employed by The City of Lago Vista Police Department, including Defendant BART TUREK, and yet they did nothing to stop it. In fact, their actions only encouraged the officers to violate more constitutional rights of the citizens of Lago Vista, all in the name of upholding the law. Said conduct is extreme and outrageous, and utterly intolerable in a civilized community. The actions of these Defendants directly and proximately caused Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, to suffer severe emotional distress, for which they are entitled to recover damages.

XII.

SEVENTH CAUSE OF ACTION: ASSAULT & BATTERY

65. Paragraphs (1)-(64) are hereby incorporated by reference as if fully set forth herein.

66. This cause of action is brought by Plaintiff GAIL ATWATER, INDIVIDUALLY, and MICHAEL HAAS, M.D., AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS, on behalf of themselves and of all persons similarly situated, against Defendants BART TUREK AND THE CITY OF LAGO VISTA.

67. On or about March 26, 1997, Defendant BART TUREK, an agent, employee, and/or servant of Defendant THE CITY OF LAGO VISTA, intentionally or knowingly threatened to cause and in fact caused physical contact between himself and Plaintiff GAIL ATWATER by touching her or laying his hands upon her for the purpose of depriving her of her freedom of movement, pretending at all times as if he, BART TUREK, were acting to uphold the law. Defendant BART TUREK knew, or reasonably should have known, that no emergency or exigent circumstances justified his conduct, in that Plaintiff GAIL ATWATER at no time posed any threat to BART TUREK's person, or to the peace and public order of LAGO VISTA. Defendant BART TUREK further knew that such touching and/or physical contact would be offensive to Plaintiff GAIL ATWATER, in addition to the injuries caused by the handcuffing and deprivation of freedom of movement, as described above (See "False

Imprisonment," Third Cause of Action, *supra*). Furthermore, Defendant BART TUREK knew or should have known that said offensive contact would be extremely upsetting to the minor children, Plaintiffs ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS, who at the time were 5 and 3 years old, respectively.

68. At all times relevant to this incident, Defendant BART TUREK was acting under color of law, and in the curse and scope of his employment as a police officer for Defendant THE CITY OF LAGO VISTA.

69. As a direct and proximate result of this assault by Defendant BART TUREK, Plaintiff GAIL ATWATER was humiliated and in front of her children and members of her community, and was unwarrantedly subjected to the extreme embarrassment and humiliation of being seized and taken to jail. Furthermore, Plaintiffs ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS were severely traumatized by watching Defendant BART TUREK assault and falsely arrest and imprison their mother.

70. Plaintiff' GAIL ATWATER, as well as Plaintiffs ANYA SAVANNAH HAAS, and MACKINLEY XAVIER HAAS, minor children represented here by their father and Next Friend MICHAEL HAAS, M.D., are entitled to recover damages from Defendants BART TUREK AND THE CITY OF LAGO VISTA for the emotional and psychological injuries they sustained as a direct and proximate result of this assault and battery.

71. Defendants' actions, as described above, deprived Plaintiffs GAIL ATWATER and her minor children ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

represented by their father and Next Friend MICHAEL HAAS, M.D., of the equal protection of the law, and other rights, privileges and immunities protected by the United States Constitution and/or other laws. As such, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS are entitled to recover damages against Defendants BART TUREK AND THE CITY OF LAGO VISTA, pursuant to 42 U.S.C. §§1983, 1985, and 1988.

72. Additionally, Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS are entitled to recover damages against Defendants BART TUREK AND THE CITY OF LAGO VISTA pursuant to the Texas Tort Claims Act, Texas Civil Practice and Remedies Code, §§101.001 et. seq.

73. In committing the acts described above, Defendant BART TUREK acted intentionally, recklessly, wantonly, and/or with malice toward Plaintiffs GAIL ATWATER, ANYA SAVANNAH HAAS, AND MACKINLEY XAVIER HAAS, thus entitling Plaintiffs to an award of exemplary damages.

XIII.

EIGHTH CAUSE OF ACTION: GROSSLY NEGLIGENT HIRING AND RETENTION OF BART TUREK

74. Plaintiffs reallege paragraphs (1)-(73) as if fully set forth and copied herein.

75. Plaintiff GAIL ATWATER, individually, and Plaintiff MICHAEL HAAS, as Next Friend of his minor children

ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS, on behalf of themselves and all persons similarly situated, do hereby sue and bring this cause of action against the CITY OF LAGO VISTA and FRANK MILLER for the grossly negligent hiring and retention of Defendant BART TUREK.

76. Plaintiffs will show that so many complaints have been lodged against BART TUREK that his incompetence and unsuitability to serve in the Lago Vista Police Department were actually known or should in the exercise of minimal diligence have been well-known to the Defendants CITY OF LAGO VISTA and FRANK MILLER.

77. Plaintiffs will show that, in a June 19, 1997 newspaper article quoting the Defendants or their agents herein, concerning the Defendants' handling of the events described above which gave rise to this lawsuit, Defendants MILLER and CITY OF LAGO VISTA referred to the Defendant BART TUREK as one of "the finest young officers I have seen in my entire career."

78. The attitude and policy of Defendants CITY OF LAGO VISTA and FRANK MILLER evinces no mere inattention or momentary thoughtlessness, but a purposeful disregard of the rights and dignity of the residents of Lago Vista and the citizens of the State of Texas. In sum the behavior of Defendants is that kind of wilful and grossly negligent conduct for which the law of the State of Texas allows punitive and exemplary damages.

79. A municipality and police department of reasonable prudence would not have hired or retained Defendant BART TUREK.

80. As a direct and proximate result of the negligent hiring and retention of Defendant BAR [sic] TUREK by Defendants CITY OF LAGO VISTA and FRANK MILLER, Plaintiffs, including all class members have suffered actual, consequential, and special damages in excess of the minimum jurisdictional limits of this Court.

XIV.

NINTH CAUSE OF ACTION: CONSPIRACY TO FORMULATE AND ENFORCE A MUNICIPAL POLICY TO VIOLATE CONSTITUTIONAL RIGHTS

81. Plaintiffs reallege each and every, all and singular, of the facts stated heretofore in paragraphs (1)-(80) above as if the same were fully copied and restated herein.

82. Plaintiffs allege that Defendants CITY OF LAGO VISTA and FRANK MILLER did agree among themselves and, with a meeting of the minds and a joint purpose, conspire to institute and maintain a municipal policy of police abuse in general disregard and derogation of the rights guaranteed to the people of the United States by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, in violation of 42 U.S.C. §1983.

83. Plaintiffs allege that Defendants CITY OF LAGO VISTA and FRANK MILLER employed Defendant BART TUREK as a willing agent and instrument of this municipal policy.

84. Plaintiffs allege and will show that the CITY OF LAGO VISTA and FRANK MILLER further conspired with each other to disguise and cover up their policy by

making, by and through their agents, such as that made by a certain city attorney BARNEY KNIGHT, that "losses from traffic outweigh those of crime."

85. Plaintiffs allege and will show that many individuals in Lago Vista live in fear and distrust of the Defendants CITY OF LAGO VISTA and its police department under Defendant Chief FRANK MILLER.

86. Plaintiffs allege and will show that they, individually, and all persons similarly situated have suffered and continue to suffer actual, consequential, and special damages from the municipal policy of the Defendants CITY OF LAGO VISTA and FRANK MILLER, in excess of the minimum jurisdictional limits of this Court.

87. The conduct of the CITY OF LAGO VISTA and FRANK MILLER, in this connection, is the kind of wilfull [sic] and intentional conduct for which the law of the State of Texas provides punitive and/or exemplary conduct to punish such conduct as the conspiracy herein alleged, and to deter such conduct in the future.

XV.

TENTH CAUSE OF ACTION: COMMON FUND

88. Plaintiffs reallege each and every, all and singular, of the facts stated heretofore in paragraphs (1)-(87) above as if the same were fully copied and restated herein.

89. Plaintiffs, by filing this their First Amended Petition against the Defendants CITY OF LAGO VISTA, FRANK MILLER, and BART TUREK, seek to create a common fund or common resource for the benefit of all victims of civil rights abuse and illegal activities by the Lago Vista

Police Department. This would include victims of police abuse, harassment, mistreatment, false arrest, false imprisonment, and/or use of excessive or unreasonable force, and all other persons situated similarly to the Plaintiffs.

90. Plaintiffs allege and will show that the CITY OF LAGO VISTA, FRANK MILLER, and BART TUREK have each individually and in concert with one another acted in with malice and in bad faith towards all victims of police abuse and harassment. Furthermore, these defendants lack just cause in the treatment of the citizens and visitors to Lago Vista in the first place, and it would be equitable, fair, and just to grant to Plaintiffs their attorney's fees in this matter incurred.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs move, request, and pray, for themselves and all other members of the class, that Defendants be cited to appear and answer, that as a preliminary matter the class of persons deprived by the Lago Vista Police Department of their constitutional rights under color of law be certified for purposes of bringing this class action, that a common fund be created for all victims of police abuse in Lago Vista, Texas, and that on final trial, Plaintiffs have the following:

1. Judgment against Defendants for actual damages and consequential damages in an amount in excess of the minimum jurisdictional limits of this Court;

2. Special damages;

3. Exemplary damages in an amount sufficient to punish Defendants and to deter such misconduct in the future;

4. Further damages by reason of Defendants' knowing and willful misconduct;

5. Prejudgment interest and postjudgment interest as provided by law;

6. Attorney's fees;

7. Costs of suit;

8. An order determining how damages are to be distributed among class members; and

9. **All such other and further relief, at law or in equity, to which Plaintiffs may show themselves to be justly entitled.**

RESPECTFULLY SUBMITTED,

DATE SUBMITTED:
September 3, 1997

/s/ Charles Edward Lincoln
Charles Edward Lincoln
State Bar No. 00791116
P.O. Box 4340
Lago Vista, Texas 78645

Attorney for Names Plaintiffs and Class Representatives GAIL ATWATER and MICHAEL HAAS, AND FOR ALL OTHER ALL [sic] CLASS MEMBERS

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No. 97-09063

GAIL ATWATER, Individually; and MICHAEL HAAS, M.D., As Next Friend Of Anya Savannah Haas and Mackinley Xavier Haas	§	**IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS**
vs.	§	**98th JUDICIAL DISTRICT**
THE CITY OF LAGO VISTA; BART TUREK; and FRANK MILLER	§	

SPECIAL EXCEPTIONS AND ORIGINAL ANSWER OF DEFENDANTS THE CITY OF LAGO VISTA BART TUREK AND FRANK MILLER

(Filed Sept. 8, 1997)

TO THE HONORABLE JUDGE OF SAID COURT:

THE CITY OF LAGO VISTA ("Defendant City"), BART TUREK (Defendant "Turek") and FRANK MILLER ("Defendant Miller") make and file their Special Exceptions And Original Answer To Plaintiffs' Original Petition, and would respectfully show unto the Court the following:

SPECIAL EXCEPTIONS

I.

Defendant City excepts and objects to Plaintiffs' Original Petition and any and all causes of action therein in their entirety because they fail to state a proper cause of action for which recovery is warranted. Defendant City is a governmental entity. Consequently, Plaintiffs' allegations as to Defendant City must comport with the Texas

Tort Claims Act, the Texas Constitution, and/or common law proprietary functions. Plaintiffs' allegations as to Defendant City fail to comply with the law. Defendant City respectfully requests that Plaintiffs properly plead their cause of action pursuant to the law and the Texas Rules of Civil Procedure.

II.

Defendant City excepts and objects to Plaintiffs' damages claims that do not comport with the Texas Tort Claims Act. Said Act allows recovery only for personal injury and/or death. Defendant City respectfully requests that Plaintiffs properly plead their cause of action pursuant to the law and the Texas Rules of Civil Procedure.

III.

Defendants City, Reid and Miller except and object to Plaintiffs' Original Petition in its entirety because it fails to specify the total amount for which Plaintiffs sue Defendants, in violation of Rules 47 and 56 of the Texas Rules of Civil Procedure.

IV.

GENERAL DENIAL

Defendant City, Defendant Turek and Defendant Miller generally deny each and every, all and singular, the allegations contained in Plaintiffs' Original Petition, and upon their denials, demand strict proof by a preponderance of the credible evidence.

AFFIRMATIVE DEFENSE

V.

Defendant City affirmatively pleads the exemptions from liability contained in Sections 101.021, 101.022, 101.026, 101.055, 101.056 and 101.057 of the Texas Civil Practice & Remedies Code.

VI.

Defendant City would show that liability of Defendant City in this case, if any, is limited pursuant to Sections 101.023 and 101.024 of the Texas Civil Practice & Remedies Code.

VII.

Defendants Turek and Miller would show that at all times relevant to the occurrence described in Plaintiffs' pleadings, Defendants were acting in their official capacities for The City of Lago Vista. Defendants were performing discretionary functions in good faith, and therefore, are immune from suit and liability under the doctrine of official immunity.

VIII.

Defendants City, Turek and Miller allege, by way of affirmative defense, that the conduct of Gail Atwater and Michael Haas, M.D., whether acting singly or together, or in concert with others, was the sole proximate cause, or alternatively, a proximate cause of Plaintiffs' injuries, if any. Defendants City, Turek and Miller allege that the

conduct of Plaintiffs at the time and on the occasion made the subject of this lawsuit resulted in the injuries claimed herein by Plaintiffs, and that said conduct was willful and intentional, and caused Plaintiffs' injuries.

WHEREFORE, PREMISES CONSIDERED, Defendants, CITY OF LAGO VISTA, BART TUREK and FRANK MILLER, pray this matter be set for hearing with proper notice to all parties; and upon hearing, that the Court sustain Defendants' Special Exceptions; and that judgment subsequently enter in favor of said Defendants; and for such other and further relief to which these Defendants may be justly entitled.

Respectfully submitted,

FLETCHER & SPRINGER, L.L.P.
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By: /s/ William W. Krueger, III
William W. Krueger, III
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Attorneys for Defendants
THE CITY OF LAGO VISA; BART TUREK; and FRANK MILLER

Certificate of Service

I here certify that a true and correct copy of the foregoing and attached **Special Exceptions And Original Answer Of Defendants The City Of Lago Vista, Bart Turek And Frank Miller** has been provided to the offices of:

Charles Edward Lincoln, Esq.
Post Office Box 4340
Lago Vista, Texas 78645

by Certified Mail Return Receipt Requested, by facsimile transmission, and/or by hand delivery, in accordance with the Texas Rules of Civil Procedure, on 9/8/97, 1997.

/s/ William W. Krueger III
William W. Krueger III

(8)

No. 99-1408

Supreme Court, U.S.
FILED
SEP 11 2000
CLERK

In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF PETITIONERS

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Counsel for Petitioners

**Counsel of Record*

LOTEP

QUESTION PRESENTED

Petitioner Gail Atwater was placed under custodial arrest for not wearing a seat belt, a misdemeanor that carries a fifty-dollar fine as its maximum penalty. Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, is reported as *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (en banc), and is reproduced in Appendix A to the petition for writ of certiorari.

The decision of the three-judge panel of the Fifth Circuit is reported as *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999), and is reproduced in Appendix B to the petition for writ of certiorari.

The order of the United States District Court for the Western District of Texas was not published, but is reproduced in Appendix C to the petition for writ of certiorari.

JURISDICTION

The court of appeals' judgment was entered on November 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioners' petition for writ of certiorari was filed on February 22, 2000, and this Court granted the petition on June 26, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Tex. Transp. Code Ann. § 545.413 (West 1999) (subsequently amended effective Sept. 1, 1999).

The statute is set out, in relevant part, in the petition for writ of certiorari at p. 2.

STATEMENT OF THE CASE

This case concerns a constitutionally unreasonable use of a full custodial arrest for a fine-only traffic offense. Following a traffic stop, a Lago Vista police officer placed petitioner Gail Atwater under full custodial arrest for violating a Texas statute that requires the use of seat belts.

I. The Facts

Gail Atwater and her family have been residents of the small town of Lago Vista, Texas for sixteen years. (R. 376). Ms. Atwater is a full-time mother and her husband, Michael Haas, is an emergency room physician at a local hospital. (R. 376-77). Their daughter Anya was almost six years old and their son Mac was almost four years old at the time of this incident. (R. 377).

On the afternoon of March 26, 1997, Gail Atwater was driving Anya and Mac home from soccer practice. After leaving the soccer field, one of the children realized they had lost a favorite toy, a winged bat made of rubber with a suction cup that had been affixed to the outside of the truck window. (R. 380). The children asked their mother if they could look for it, so Ms. Atwater back-tracked along the route they had taken to drive to the soccer field. The children had previously been wearing seat belts, but Ms. Atwater permitted them to take off their belts so they could look out the truck's windows in search of their lost toy. (R. 380). There was no traffic on the

residential street near their home on which they were driving, and their speed was approximately fifteen miles-per-hour. (R. 380).

Respondent Bart Turek, a Lago Vista police officer, observed the seat-belt violation and stopped them. While Ms. Atwater and her children remained in her vehicle, Officer Turek approached, then stood by the driver's window and aggressively jabbed his finger toward her face. Officer Turek screamed either that they had met before or that they had had this conversation before. (R. 381-82, 384, 703). Officer Turek's conduct frightened Ms. Atwater's children and they began to cry; she then calmly and in a normal tone of voice requested that Officer Turek lower his voice. (R. 382, 703). Officer Turek responded by telling Ms. Atwater that she was going to jail. (R. 382).

There is no evidence in this summary judgment record indicating in any way that Gail Atwater was sarcastic or belligerent, or that she challenged Officer Turek's authority. (R. 388-89, 414). Ms. Atwater was not under the influence of drugs or alcohol. She was not acting suspicious in any way, she did not pose any threat to Officer Turek, and she was not engaged in any illegal conduct in the officer's view, other than her violation of the seat belt law, when he announced his intention to arrest her.

Despite the lack of any provocation, Officer Turek continued to speak to Gail Atwater in a verbally abusive manner, accusing her of not caring for her children. (R. 384-85, 388-89, 704-05). Ms. Atwater's children and several bystanders, including friends and neighborhood residents, witnessed the incident. (R. 382, 385, 393, 399-400, 405).

Officer Turek's continued verbal abuse and his assertions that Ms. Atwater was on her way to jail caused her children to become increasingly frightened and distressed, so Ms. Atwater asked Officer Turek to allow her to take her children to a friend's home just houses away. (R. 384, 704). Officer Turek refused, and initially planned to take the children into custody as well. (R. 384, 389, 403, 427). Luckily, a friend of the family was called to the scene by a neighborhood child who happened to pass by, and the friend took the children into her care. (R. 385-86, 705).

Officer Turek claimed he had recently stopped Ms. Atwater for not having her children in seat belts (R. 420), but this was false. (R. 379, 405, 703-07). Officer Turek had stopped her several weeks before for allowing her son Mac to ride on the front seat arm rest, but his seat belt had been securely fastened. (R. 379, 703). No citation was issued, and Officer Turek had not told her the basis for making the traffic stop. (R. 379).

Police officers in Texas, as in other states, may issue tickets after stopping motorists for traffic violations. Tex. Transp. Code Ann. §§ 543.003-.005 (West 1999). Rather than doing this, Officer Turek placed Ms. Atwater under full custodial arrest.[1] He handcuffed her with her hands behind her

[1] Officer Turek later claimed that he had also arrested Ms. Atwater for not carrying a driver's license and proof of insurance. (She had neither with her because her purse had recently been stolen.) Officer Turek's claim is inconsistent with his pronouncement, before requesting her license or proof of insurance, that he was taking her to jail. It is also disingenuous because Ms. Atwater provided him with her driver's license number, and Officer Turek had seen both her license and proof of insurance during the previous stop. Be that as it may, even if Officer Turek's

back, loaded her into his squad car, and took her to the police station. (R. 386). At the police station, she was forced to remove her shoes, jewelry and glasses, and empty her pockets. Ms. Atwater's "mug shot" was taken, and she was placed in a jail cell for approximately one hour until being taken before a magistrate. (R. 386-88, 706). She was released after posting a $310 bond. (R. 424).

Gail Atwater pled no contest to the seat belt offense and paid the maximum penalty for this violation — a $50 fine. Charges of driving without a license and proof of insurance, *see supra*, note 1, were dismissed.

II. The Proceedings Below

Petitioners Gail Atwater and her husband Michael Haas, as next friend for their children, filed suit in state court against respondents, the City of Lago Vista, Officer Bart Turek, and Chief of Police Frank Miller, for damages suffered by petitioners arising from Ms. Atwater's incarceration.

Respondents removed the suit to the United States District Court for the Western District of Texas, which granted their motion for summary judgment. The district court ruled that petitioners had not identified a constitutional right that had been violated by the custodial arrest. *See* Pet. App. C.

after-the-fact justification is accepted, the penalties for these offenses are also minor fines. *See* Tex. Transp. Code Ann. §§ 521.025(c), 601.191(b) (West 1999). Furthermore, it is a defense to prosecution if the person charged thereafter produces a valid license and proof of insurance (as Officer Turek well knew that Ms. Atwater would be able to do). *See* Tex. Transp. Code Ann. §§ 521.025(d), 601.193 (West 1999). Officer Turek's contention has no bearing on the Fourth Amendment issue.

A three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the summary judgment with respect to the Fourth Amendment claim, holding petitioners had established that the custodial arrest for not wearing a seat belt violated a clearly established Fourth Amendment right. The remainder of the district court's judgment was affirmed. *See* Pet. App. B.

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. After oral argument, a majority affirmed the district court's judgment in all respects, holding that the custodial arrest did not violate Ms. Atwater's Fourth Amendment rights. Six judges dissented. *See* Pet. App. A.

SUMMARY OF THE ARGUMENT

Gail Atwater was handcuffed and taken to jail because she and her children were not wearing their seat belts. Placing Ms. Atwater under custodial arrest for this fine-only traffic offense violated the Fourth Amendment's requirement that all seizures be reasonable.

Determining whether a particular governmental action violates the Fourth Amendment requires first asking whether the action would have been prohibited at common law when the Fourth Amendment was adopted. If the answer is unclear, then reasonableness is evaluated by balancing the degree of the intrusion on the individual against the degree to which the intrusion is necessary to further a legitimate governmental interest. *See Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999).

Applying this analysis demonstrates that the custodial arrest here violated the Fourth Amendment. The Fourth Amendment was adopted in response to the use of general

warrants and writs of assistance to prevent the very sort of unbridled discretion that the court below condones. The arrest here would also have been unlawful when the Fourth Amendment was adopted because warrantless arrests were not permitted for misdemeanors unless they were breaches of the peace. Furthermore, even if history is viewed as providing no clear answer, balancing the competing interests does: handcuffing Ms. Atwater in front of her children and taking her to jail furthered no legitimate law enforcement objective that could not also have been accomplished by issuing a traffic citation.

Instead of applying the analysis mandated by this Court's precedents, the court below created a broad *per se* rule blessing all custodial arrests as long as there is probable cause to believe that an offense has occurred. This Court has never held this to be the law, and the holding below ignores and undermines decisions of this Court. There is, however, a rule that would be good public policy, be consistent with this Court's precedents, and satisfy the Fourth Amendment's requirement of reasonableness: The Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road.

ARGUMENT

I. Both the History Leading to the Fourth Amendment's Adoption and Founding-Era Rules Governing Warrantless Arrests Make Clear that the Custodial Arrest Here Was Unconstitutional

In determining Fourth Amendment reasonableness, this Court has reviewed the history leading to the Fourth

Amendment's adoption and inquired whether a specific seizure would have been unlawful at the time of the Fourth Amendment's adoption. In fact, this Court conducted just such a detailed historical review in one of its last major decisions that considered whether a warrantless public arrest complied with the Fourth Amendment. *See United States v. Watson*, 423 U.S. 411, 418-20 (1976). An historical inquiry demonstrates the court of appeals' error. The Fifth Circuit erred in holding police officers have unfettered discretion, rivaling that of colonial officers acting under general warrants or writs of assistance, to arbitrarily select which drivers to jail for traffic offenses, and by ignoring the founding-era rule that prohibited warrantless misdemeanor arrests except for breaches of the peace.

A. The Fourth Amendment Was Adopted to Check Unfettered Discretion of the Sort Given by General Warrants and Writs of Assistance to Conduct Searches and Seizures Arbitrarily

This Court has repeatedly recognized the events that gave birth to the Fourth Amendment: a rejection of the use of general warrants in England and writs of assistance in colonial America. *See, e.g., Warden v. Hayden*, 387 U.S. 294, 301 (1967); *Henry v. United States*, 361 U.S. 98, 100-01 (1959); *Boyd v. United States*, 116 U.S. 616, 624-626 (1886). General warrants and writs of assistance were offensive to colonial Americans because they gave governmental officials unbridled discretion to conduct arbitrary searches and seizures. The Fourth Amendment was a direct response to these abuses, and sought to curtail this discretion.

1. John Wilkes and the rejection of general warrants in England

General warrants gave those using them complete discretion as to whom to arrest, where to search, and for what to search. General warrants became the focus of public attention in England in the 1760s with the searches and arrests associated with John Wilkes' anti-government pamphlets. *See* Telford Taylor, *Two Studies in Constitutional Interpretation* 29-35 (1969); Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43-48 (1937); 2 William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 886-950 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

With the legal victories of Wilkes and his supporters came court decisions condemning the broad discretion granted by general warrants. For example, in declining to set aside a £300 damage award as excessive for a journeyman printer's wrongful arrest and six-hour imprisonment, Chief Justice Pratt wrote that the jury was justified in awarding the damages to condemn the arbitrary exercise of power that the arrest represented: "[The jury] saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them." *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (K.B. 1763).

Pratt expanded on these concerns in Wilkes' own trespass suit against the undersecretary of state who supervised the search of Wilkes' house, holding that "discretionary power given to messengers to search wherever their suspicions may chance to fall" would "affect the person and property of every man in this kingdom, and is totally subversive of the liberty of

the subject." *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167, 98 Eng. Rep. 489, 498 (C.P. 1763); *see also Leach v. Money*, 19 Howell St. Tr. 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765) (Mansfield, J.) ("It is not fit, that the receiving or judging of the information [regarding cause to arrest or search] should be left to the discretion of the officer.").

These and other judicial repudiations of general warrants in England did not go unnoticed in America. Wilkes was a hero to the colonists and his resistance to the general warrants an inspiration that had a strong influence on the framing of the Fourth Amendment. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994) (describing *Wilkes* as "the paradigm search and seizure case for Americans," "whose lesson the Fourth Amendment was undeniably designed to embody.").

2. Challenges to writs of assistance in colonial America

At about the same time John Wilkes and others were challenging the use of general warrants in England, American colonists were challenging the use of writs of assistance by British customs officers. The writs gave officials using them even greater discretion than the general warrants used against Wilkes and his compatriots. Any person authorized by a writ of assistance had almost limitless powers to search. All officers and subjects of the Crown were commanded to assist in the execution of the writs, and the writs expired only on the reigning sovereign's death. *See* Lasson, *supra*, at 53-54.

In February 1761, after the writs had expired following the death of King George II, sixty-three Boston merchants brought suit to halt the issuance of new writs of assistance. The merchants were represented by James Otis, Jr. *See* Lasson,

supra, at 53-54. Otis challenged the broad discretion the writs gave customs officers, arguing that they were "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law book." 2 *Legal Papers of John Adams* 140 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). "It is a power that places the liberty of every man in the hands of every petty officer." *Id.* at 141-42. Otis and his merchant clients lost their legal battle, but their challenge inspired Americans to resist British rule, culminating with the Declaration of Independence.[2]

The condemnation of discretionary arrest and search authority voiced by Pratt and Otis was repeated when colonial judges later refused to issue general writs after their authorization by the Townsend Act of 1767. The colonial judges consistently condemned such writs as illegal precisely because they purported to confer discretionary authority on officers. *See* Thomas Y. Davies, *Recovering the Fourth Amendment*, 98 Mich. L. Rev. 547, 556-57 (1999).

The battles against general warrants and writs of assistance were still fresh in the minds of Americans when they were considering whether to adopt a new Constitution. Many were concerned that the new Constitution contained no bill of rights, and specifically no provision curbing broad discretion to search and seize. Anti-federalist opponents to the Constitution argued that it would not restrict agents of the new federal government from conducting arbitrary and invasive searches.

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[2] A young John Adams was a spectator in the packed courtroom during Otis' argument. *See* Lasson, *supra*, at 58-59. He later described the argument as one of the key events leading to the American Revolution. *Id.* at 59-61.

See generally Lasson, *supra*, 92-96; 3 Cuddihy, *supra*, at 1361-1416.

Search and seizure was addressed in at least seven of the state conventions that considered the Constitution, and the last four voting to ratify the Constitution requested that a search and seizure provision be added. *See* 3 Cuddihy, *supra*, at 1380. Of course, the provision ultimately adopted did not ban just general warrants, but any "unreasonable" search or seizure of a similarly arbitrary nature. *See* U.S. Const. amend. IV; Lasson, *supra*, at 103.

3. The Fourth Amendment repudiated unfettered search and seizure discretion

Because of the familiar history leading to the Fourth Amendment's adoption, this Court has recognized that the principle aim of the Fourth Amendment is to limit law enforcement discretion, and thereby prevent arbitrary searches and seizures. "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *see also Delaware v. Prouse*, 440 U.S. 648, 661 (1979). Numerous legal commentators also have recognized that the primary aim of those adopting the Fourth Amendment was to limit governmental discretion. *See, e.g.*, Davies, *supra*, at 556; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 201 (1992); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 222 (1989).

B. Warrantless Arrests Could Only be Made for Felonies and Breaches of the Peace Committed in the Presence of the Arresting Official

This Court has also considered whether a specific seizure would have been unlawful at the time of the Fourth Amendment's adoption to determine whether the seizure complies with the Amendment. *See, e.g., United States v. Watson*, 423 U.S. 411, 418-20 (1976); *Carroll v. United States*, 267 U.S. 132, 149 (1925). Contemporary common-law rules limited the discretion of peace officers to arrest for minor crimes. The founding-era rule was that an arrest could only be made for a misdemeanor when it was ongoing and a breach of the peace:

> In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.

Carroll, 267 U.S. at 157 (quoting Halsbury's Laws of England, vol. 9, part. III, 612); *see also Davis v. United States*, 328 U.S. 582, 610 n.4 (1946) (Frankfurter, J., dissenting) ("The common law rule restricted arrest without warrant for a misdemeanor to those acts which were breaches of the peace.").

Breach of the peace was a category of non-felony public offenses involving or tending toward violence. Sir Matthew Hale listed "breaches of the publick Peace" as one of three

categories of "[o]ffenses of an Inferior nature."[3] Matthew Hale, *Pleas of the Crown* 134 (2d ed. 1678). The category consisted of affrays, riots, forcible entries, barretries and riding armed. *Id.*; *see also* 1 William Hawkins, *A Treatise of the Pleas of the Crown* 126 (1716) ("Inferior Offenses more immediately against the Subject, not capital, either amount to an actual Disturbance of the Peace, or do not."). William Blackstone also distinguished "Offenses against the Public Peace," discussed in volume four, chapter eleven of his *Commentaries*, from lesser categories of offenses, such as "Offenses against the Public Health, and the Public Police or Oeconomy," which were the subject of chapter thirteen. *See* 4 William Blackstone, *Commentaries on the Laws of England*, 142-53, 161-75 (1769).

This continued to be the generally accepted definition into the nineteenth century. *See, e.g.*, 1 John Bouvier, *A Law Dictionary* 146 (1839) (defining "breach of the peace" as "[a]ny offense against public tranquility, when accompanied by violence."); *see also* Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 230 (1940) (defining breach of the peace as "a public offense done by violence or one causing or likely to cause an immediate disturbance of public order.").

The limitation of warrantless arrests to felonies and ongoing breaches of the peace was well-settled prior to the Fourth Amendment's adoption. "[A] constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest." *Regina v. Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352 (K.B. 1710). The rule was

[3] The other two categories of inferior offenses were "Deceipts and Conzenage," and "Nusances." Matthew Hale, *Pleas of the Crown* 134 (2d ed. 1678).

repeated in legal treatises,[4] legal dictionaries,[5] and the handbooks used by the officials required to apply the rule.[6]

The authority to arrest without a warrant for breaches of the peace was based on the nature of the offenses, *i.e.*, that they were violent public disturbances or threats thereof. As Chief Justice Taft explained for the Court in *Carroll v. United States*, the purpose of arresting for breaches of the peace was not to enable apprehension of criminals (the basis for warrantless felony arrests), but to bring an end to the breach of the peace. *Carroll*, 267 U.S. at 157; *see also* Francis H. Bohlen & Henry Shulman, *Arrest With and Without a Warrant*, 75 U. Pa. L. Rev. 485, 490 (1927); *see generally City of Chicago v.*

[4] *See, e.g.*, Matthew Hale, *Pleas of the Crown* 92 (2d ed. 1678); 2 William Hawkins, *A Treatise of the Pleas of the Crown* 75, 77 (1721); 4 William Blackstone, *Commentaries on the Laws of England* 289 (1769).

[5] "None shall be *arrested* for Debt, Trespass &c. or other Cause of Action, but Virtue of a Precept or Commandment out of some Court: But for Treason, Felony, or Breach of the Peace, any Man may *arrest* without Warrant or Precept." Giles Jacob, *A New-Law Dictionary* (7th ed. 1756) (definition of "arrest"); *see also* J. Johnson, *Les Termes de la Ley* 38 (1st Am. ed. 1812) (same definition for "arrest").

[6] *See, e.g.*, *The Conductor Generalis* 25 (Hugh Gaine ed., New York 1788) (limiting a constable's warrantless arrest power to felons and for a "breaker of the peace in his view"); Francois-Xavier Martin, *The Office and Authority of a Justice of the Peace, and of Sheriffs, Coroners, &c. According to the Laws of the State of North-Carolina* 45 (1791) ("In all criminal cases, *where any one is in danger of life, or member*, any private man may arrest another, without process or warrant . . . .") (emphasis added); Eliphalet Ladd, *Burn's Abridgment, or the American Justice* 40-41 (1792).

Morales, 527 U.S. 41, 106-08 (1999) (Thomas, J., dissenting) (describing police officers' common-law "responsibility for preserving the peace").

For other misdemeanors that did not involve public disturbances or actual or threatened violence, there was no need for an exception to the warrant requirement. In fact, one of the bases for distinguishing misdemeanors from felonies at common law was that, unlike a felony, an arrest could not be made for a misdemeanor without a warrant unless it was an ongoing breach of the peace. *See* 9 *Encyclopaedia of the Laws of England* 268 (2d ed. 1908) (defining "misdemeanor"). Immediate arrests were not seen as necessary for misdemeanors. For this reason, a summons was used to initiate the criminal process for a misdemeanor charge, unlike a felony charge, which began with the issuance of an arrest warrant.[7]

In other contexts, "breach of the peace" had a broader meaning that encompassed any violation of the criminal law,

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[7] James Wilson, a signatory of both the Declaration of Independence and the Constitution, and also an early member of this Court, recognized this distinction:

> On an indictment for any crime under the degree of treason or felony, the process proper to be first awarded, at the common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require the appearance of the party. . . . On an indictment for felony or treason, a capias is always the first process.

2 *Works of James Wilson* 689-90 (Robert G. McCloskey, ed. 1967). Wilson noted that it was "now the usual practice" in England to issue a *capias* even for misdemeanors, but he indicated no similar change in this country. *Id.* at 690.

synonymous with the phrase "breach of the king's peace,"[8] but the phrase was used in its narrow sense when describing the power to arrest. *See* 11 *Encyclopaedia of the Laws of England* 3 (2d ed. 1908). In fact, founding-era dictionaries distinguished the term "peace," which was associated with the powers of justices of the peace to prevent public disturbances, from the phrase "peace of the king." *See, e.g.*, T. Cunningham, *A New and Complete Law-Dictionary* (1783 ed.) (definitions of "Peace" and "Peace of the King"); 5 Giles Jacob, *The Law-Dictionary* 112-13 (Am. ed. 1811) (entries for "Peace" and "Peace of the King"). The distinction continued to be recognized during the eighteenth century. *Compare* 1 John Bouvier, *A Law Dictionary* 190 (11th ed. 1865) (defining "breach of the peace"), *with* 2 John Bouvier, *A Law Dictionary* 322 (11th ed. 1865) (defining "pax regis" and "peace").

Following the Fourth Amendment's ratification, the common law rule was well-settled for roughly the first one hundred years of the Republic. Through most of the nineteenth century, courts continued to hold that a warrantless misdemeanor arrest was unlawful when not a breach of the peace.[9] Nineteenth-century American legal commentators were

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[8] The phrase was used in this broader sense when it appeared on a criminal indictment.

[9] *See, e.g.*, *Pow v. Beckner*, 3 Ind. 475, 478 (1852) ("To justify a constable in apprehending without process for an affray, the affray must take place in his view and be still continuing. After it is over he has no more power to arrest the offenders than any other person."); *Commonwealth v. Carey*, 66 Mass. (12 Cush.) 246, 250 (1853) ("[E]ven if he were a constable, he had no power to arrest for any misdemeanor without a warrant, except to stay a breach of the peace, or to prevent the commission of such an offense); *Robison v. Miner*, 68 Mich. 549, 556-59, 37 N.W. 21, 25 (1888) (holding

no different, and in fact, some stated the rule as prohibiting *all* warrantless misdemeanor arrests. William L. Murfee, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 1161, at 629-30 (1884). Other treatises limited warrantless misdemeanor arrests to offenses involving public violence.[10]

By the early twentieth century, courts had begun to ignore the breach-of-the-peace requirement,[11] and legislation in many states permitted warrantless arrests for any misdemeanor committed in an officer's presence. *See* T.W. Hughes, *A Treatise on Criminal Law and Procedure* § 876, at 597 (1919). Obviously, these alterations to the common law a century or more after the Fourth Amendment's adoption provide no insight into the understanding of the Amendment when it was ratified.

Moreover, these changes to the common law rule were made by state courts and legislatures *before* this Court held the Fourth Amendment applied to the states. *See Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). They therefore do not constitute legislative opinions on their constitutionality. Because the Fourth Amendment did not apply to the states, state legislatures would not have been concerned whether their legislation met

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unconstitutional the portion of a liquor law that deemed its violations to be breaches of the peace and permitted warrantless arrests); *see also* Bohlen & Shulman, *supra*, at 486 & n.3 (citing cases).

[10] *See also* 1 Joseph Chitty, *A Practical Treatise on the Criminal Law* 15 (1st Am. ed. 1819); John G. Crocker, *The Duties of Sheriffs, Coroners and Constables* § 48, at 33 (2d ed. 1871).

[11] Contemporary commentators perceived those courts to be misreading this Court's decision in *Carroll v. United States*, 267 U.S. 137 (1925). *See* Bohlen & Shulman, *supra*, at 487-883.

Fourth Amendment standards. Moreover, to hold that post-Fourth-Amendment-adoption alterations to the common law by states are relevant when made before the Fourth Amendment applied to the states would permit state legislatures to preemptively nullify federal constitutional rights before they applied to them. *Cf. Dickerson v. United States*, 530 U.S. ___, slip op. at 1 (June 26, 2000) (rejecting the argument that an Act of Congress vitiated *Miranda* because "a constitutional decision . . . may not be in effect overruled by an Act of Congress").

C. Because Officer Turek's Arrest of Gail Atwater Would Have Been Unlawful When the Fourth Amendment Was Adopted, the Arrest Was Unconstitutional

Gail Atwater was not breaching the peace when she and her children rode in her truck at fifteen-miles-per-hour unrestrained by seat belts. Though there may be traffic offenses that qualify as breaches of the peace, this is not one of them.

Non-use of seat belts is not, by any stretch of the imagination, a public disturbance or an act likely to incite violence in others. It is not even a *public* offense. Unlike many traffic offenses, violations of the Texas seat-belt law have virtually no impact on other drivers. As the three-judge panel of the Fifth Circuit astutely observed, the seat-belt law is one of several "paternalistic statutes" that Texas and many states have adopted "to protect a specific individual from his own conduct, conduct which poses no threat to the public at large." *Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5th Cir. 1999) (panel), Pet. App. B at 37a. It is difficult – if not impossible – to conceive of a traffic violation that is further from a breach of peace than the seat-belt law.

Furthermore, the common law justification for warrantless breach-of-the-peace arrests is wholly absent in this case. There is no indication that a custodial arrest was necessary to prevent the offense from continuing. In fact, the record indicates the opposite. Ms. Atwater told her children that the policeman was right, and they had broken the law by not wearing their seat belts. (R. 384).

At a minimum, the Fourth Amendment prohibits seizures that were unlawful at the time of the Amendment's adoption. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *see also County of Riverside v. McLauglin*, 500 U.S. 44, 60-61 (1991) (Scalia, J., dissenting) (citing *California v. Hodari D.*, 499 U.S. 621 (1991)). Because the arrest of Gail Atwater would not have been permitted by founding-era common-law rules, her arrest violated the Fourth Amendment.

D. The Decision Below Is Contrary to the Fourth Amendment Because It Grants Law Enforcement Unfettered Discretion to Search and Arrest of the Sort the Fourth Amendment Was Meant to End

The court below not only ignores the nature of the offense for which Ms. Atwater was arrested, but also leaves to the complete discretion of every police officer whether to use custodial arrests for any traffic violation. The Fifth Circuit thereby gives law enforcement the very sort of broad discretion to commit arbitrary searches and seizures that the Fourth Amendment sought to end.

Because of the immense number of traffic laws, it is virtually impossible for any person to drive for any significant distance without committing some infraction. *See, e.g.*, Salken, *supra*, at 223. Violations of traffic laws are numerous. 1993

Department of Transportation statistics indicated that 50% of all vehicles at any time were violating the then-maximum speed limit of 55 miles per hour, with 71% of the vehicles speeding on urban interstates, and 80% on rural interstates. *See* U.S. Dep't of Transportation, National Maximum Speed Limit -- Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics tbls. 1 & 3 (Oct. 1995). More recently, seven out of ten drivers admitted in an official survey that they had run a red light at least once in the past year. *See* 2 U.S. Dept. of Transportation, National Highway Traffic Safety Administration, National Survey of Speeding and Other Unsafe Driving Actions 119 (1998) (report no. DOT HS 808 749). Violations of seat belt laws are also fairly common. At any given time, almost one-third of vehicle occupants are not using their seat belts. 2 U.S. Dept. of Transportation, National Highway Traffic Safety Administration, 1998 Motor Vehicle Occupant Safety Survey 20 (2000) (report no. DOT HS 809 051).

An observant police officer can come up with a traffic violation for almost any vehicle. *See, e.g., United States v. Smith*, 80 F.3d 215, 219 (7th Cir. 1996) (condoning a traffic stop based on the officer's belief that an air freshener hanging from the rear view mirror of a car amounted to a material obstruction between the driver and the windshield in violation of Illinois law). This means police officers are left to choose which laws to enforce, and against which drivers to enforce them:

> [G]iven the pervasiveness of such minor [traffic] offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [probable cause for a traffic violation] hardly matters, for here as well there exists 'a power that places the liberty of every man in the hands of

> every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

1 Wayne R. LaFave, *Search and Seizure*, § 1.4(e), at 123 (3d ed. 1996) (quoting 2 *Legal Papers of John Adams* 141-42 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

Petitioners do not challenge police discretion to selectively make stops for traffic violations they observe. State legislatures have determined that various traffic laws help insure safer roads and highways, and police should enforce those laws by making traffic stops and issuing citations for their violation. *See Whren v. United States*, 517 U.S. 806, 818 (1996) ("[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."). Giving police the discretion to choose which violations to enforce and choosing which vehicles to stop is an acceptable concession to permit enforcement of these laws, even though that means traffic stops may be made for pine tree air fresheners hanging from vehicle windshields. But there is no reason to grant a similar degree of discretion to handcuff and take people to jail for those same minor violations.

Those who insisted on a bill of rights with a provision prohibiting unreasonable searches and seizures likely would be amazed at the freedom and lifestyle enabled by motor vehicles. They also would be shocked that regulation of these motor vehicles is used as an excuse to grant law enforcement almost unlimited discretion to search and seize. Such discretion may be acceptable to permit enforcement by issuance of traffic citations, but not when the discretion includes whether or not to place a person under custodial arrest.

The decision below ignored the common law altogether and turned the historical basis of the Fourth Amendment on its head. Granted, many things have changed since 1791. Organized police forces were unknown in colonial times, as were motor vehicles. Furthermore, many state courts and legislatures abandoned the breach-of-the-peace requirement during the 20th century, thereby lessening the protections afforded by the common law. Still, the evils for which the Fourth Amendment was adopted and the protections afforded by the common law should not be ignored. Balancing the competing interests shows there is no reason for doing so here.

II. Balancing the Competing Interests of Law Enforcement and the Individual Demonstrates that the Custodial Arrest of Ms. Atwater for Non-Usage of Seat Belts Was Constitutionally Unreasonable

The Fourth Amendment's over-arching command is that all searches and seizures must be reasonable. "The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Maryland v. Wilson*, 519 U.S. 408, 411 (1997) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968))). The Fourth Amendment reasonableness of a seizure is determined by balancing the competing interests of the government and the individual. "To determine the constitutionality of a seizure, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983); citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976)).

For Gail Atwater, the seizure and subsequent searches to which she was subjected were an extreme intrusion and disruption of her life and the life of her children. No legitimate law enforcement objective or governmental interest was furthered in any way by this conduct.

A. The Nature and Quality of the Intrusion on Gail Atwater's Liberty Interests Was Substantial

Gail Atwater was subjected to a custodial arrest. A custodial arrest in any circumstance is a substantial governmental intrusion, particularly for the average law-abiding citizen. The circumstances of this case – a mother handcuffed and taken to jail in front of her two young children – make the custodial arrest here particularly egregious.

1. Custodial arrests as a general matter are significant governmental intrusions

A custodial arrest of a person is the quintessential seizure. *See California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citing *Henry v. United States*, 361 U.S. 98, 100 (1959)). The Fourth Amendment therefore requires that it be reasonable. *See Payton v. New York*, 445 U.S. 573, 585 (1980). This Court has used the term "custodial arrest" to describe seizures where the person is not just detained, but taken into custody and transported to the police station. *E.g.*, *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); *United States v. Robinson*, 414 U.S. 227, 234-35 (1973).

A custodial arrest is a particularly significant governmental intrusion on an individual's liberty interest. The degree of the intrusion an arrest involves is readily apparent

when compared with a routine traffic stop. A traffic stop "is a relatively brief encounter and 'is more analogous to a so-called "*Terry* stop" . . . than to a formal arrest.'" *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). The typical traffic stop, although a Fourth Amendment seizure, often is no more than an inconvenience, in which the motorist "will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, . . . may then be given a citation, but [expects] that in the end he most likely will be allowed to continue on his way." *Berkemer*, 468 U.S. at 437; *but see Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting) ("Traffic stops, even for minor violations, can take upwards of 30 minutes."). Unlike a custodial arrest, a traffic stop is not a complete suspension of an individual's freedom. The person remains in or near his or her car, which is a less threatening and more familiar setting than a police station house or a jail cell.

A custodial arrest is likewise far more intrusive than most searches, especially a vehicle search or a *Terry* frisk. An arrest is "a wholly different kind of intrusion upon individual freedom from a limited search for weapons." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). As Justice Powell observed:

> A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, *no decision that he should go free*

can come quickly enough to erase the invasion of his privacy that already will have occurred.

United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (citations omitted) (emphasis added). The custodial arrest, not the search incident to the arrest, "is the significant intrusion of state power into the privacy of one's person." *United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J. concurring).

The significance of custodial arrests is sometimes overlooked because the focus often is on the search rather than the arrest. This is usually the case when the Fourth Amendment challenge is raised with the hope of triggering application of the exclusionary rule. For the criminal seeking to exclude otherwise admissible evidence, the search most surely is the utmost concern. But the perspective of the average citizen is the focus of Fourth Amendment balancing, not the perspective of the career criminal. *See Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("the 'reasonable person' test presupposes an *innocent* person") (citing *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting)). For the average citizen, who is always subject to a possible traffic stop for a myriad of reasons, a search is an annoyance. A custodial arrest is a nightmare.

A custodial arrest typically entails physical restraint at the outset. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (recognizing that "the right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion"). At a minimum, this restraint usually comes in the form of handcuffing, followed by physically placing the individual in the back of a locked police car for transportation to the booking station.

Once at the booking station, the arrestee is subjected to the booking process, usually including fingerprinting and a "mug shot." Valuables are taken away, and the person is placed in a jail cell. As an incident to the arrest, the arrestee is almost always subjected to a search of his or her person, and may be subjected to more extreme invasions, such as body cavity searches. An arrestee may be detained for as long as 48 hours before a probable cause determination is made by a magistrate. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). If unable to post the bond set by the magistrate,[12] the arrestee will languish in jail until a scheduled court date.

Significantly, pre-trial detention often places multiple detainees in a single holding cell, thus mingling traffic violators with persons arrested for much more serious offenses who pose a risk of physical harm to the traffic-offense arrestee. Most, if not all, liberty interests and expectations of privacy are lost as an incident to pre-trial detention. "The fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects, and therefore all searches and seizures of the contents of an inmate's cell are reasonable." *Hudson v. Palmer*, 468 U.S. 517, 538 (1984) (O'Connor, J., concurring) (citations omitted).

The harm from a custodial arrest lingers long after the detention ends. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 26 (1968) (observing that a custodial arrest "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."). The record of the arrest may linger even when there ultimately is an acquittal, and even if no charges are ever brought against the

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[12] Ms. Atwater was required to post a $310 bond to get out of jail for a $50 offense. (R. 424).

arrestee. Further, arrest records are easily accessible by the public, and may close the door on a broad array of employment opportunities. *See* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 797 (1993); Salken, *supra*, at 264. In fact, Texas tort law discourages employers from hiring persons with arrest records. *See Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734 (Tex. 1998).

An arrest following a traffic stop is an even greater governmental intrusion. An arrest for a traffic violation comes as a particularly great shock to a driver, whose expectation is that, at most, it will end with a traffic citation. *See Berkemer*, 468 U.S. at 437. Also, the arrest is commonly a public spectacle, made on the side of a public road in full view of all passers by.

The searches that may accompany the arrest also are more intrusive when a custodial arrest follows a traffic stop. The search incident to arrest encompasses not just the person of the arrestee, but also the vehicle the arrestee had occupied. *See New York v. Belton*, 453 U.S. 454, 460-61 (1981). The vehicle is frequently impounded, and reacquisition requires payment of impoundment fees – regardless of whether a criminal charge follows the arrest. The vehicle then may be subjected to a more thorough search in which the vehicle's contents are inventoried. *See Colorado v. Bertine*, 479 U.S. 367 (1986).

2. The custodial arrest of Gail Atwater was particularly invasive and extreme

The arrest of Gail Atwater had all the characteristics of a full custodial arrest. Furthermore, the arrest was exacerbated by a police officer's humiliating a mother in front of her two young children.

Ms. Atwater was subjected to a full-fledged custodial arrest. Officer Turek handcuffed Ms. Atwater's hands behind her back, loaded her into a police squad car, and then transported her to the police station. Once at the police station, Gail Atwater was forced to remove her shoes and glasses, and empty her pockets, then a "mug shot" was taken. (R. 386-88; 706). She was then placed in a cold jail cell for approximately one hour before being taken to a magistrate. Meanwhile, her vehicle was towed to an impound lot in another city and its interior searched and inventoried.[13] She then had to pay an additional $110 to get it back. (R. 400).

This arrest was particularly egregious because of the presence of Ms. Atwater's children. The arrest began with Officer Turek yelling at her, which subsequently included accusations – in front of her children – that she was a bad mother and did not care about her children. (R. at 384-85, 388-89, 704-05). He also implied Ms. Atwater was a liar, again in front of her children. Officer Turek's behavior is all the more distasteful – and detrimental to Ms. Atwater's children – when it came immediately after she had explained to her children that they were "wrong" for not wearing their seat belts and the police officer was just "doing his job." (R. 384). Ms. Atwater's four-year-old son and six-year-old daughter received a traumatic lesson on what this police officer thought his job entailed.

After hearing their mother vilified by a man with a gun, the children then watched him handcuff their mother and take

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[13] The inventory revealed the following: two tricycles, one bicycle, one igloo cooler, two pairs of children's shoes, toys, food, and a bag of Kingsford charcoal. (R. 426).

her away.[14] And what was to become of Gail Atwater's two young children when she was taken to jail? Ms. Atwater begged Officer Turek to permit her to bring her children to a friend's home a few houses away, but he refused. (R. 384, 704). Initially, he planned to take the children into custody as well. (R. 427). Luckily, a family friend arrived, and Officer Turek permitted her to take the children. (R. 386).

The governmental intrusion here was undoubtedly substantial. Ms. Atwater was subjected to a full custodial arrest which her young children were forced to witness.

B. The Government's Interest in Enforcing the Seat Belt Law Does Not Justify the Intrusion Here

Petitioners recognize that as a general matter, government has a "'vital interest' in highway safety and the various programs that contribute to that interest." *New York v. Class*, 475 U.S. 106, 112 (1986) (citing *Delaware v. Prouse*, 440 U.S. 648, 658 (1979)). Seat belt laws, however, are readily distinguishable from most laws that further highway safety: they are "designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large." 165 F.3d 380, 385, Cert. Pet. App. B at 37a. The remaining issue is whether the governmental interest in enforcing the seat belt laws was furthered in any conceivable way by the handcuffing and arrest of Gail Atwater in front of her children. It was not.

[14] This was particularly harmful to the children because they blame themselves for their mother's arrest: they had lost a toy, and were out of their seat belts so they could look out the windows to try to find it. (R. 380, 396).

1. The governmental interest in enforcing the seat belt law is relatively slight

The Texas seat belt statute is a criminal law of relatively recent vintage. *See* Act of July12, 1984, 68th Leg., 2nd C.S., ch. 1, § 1, 1984 Tex. Gen. Laws 11, 12. Indeed, seat belts were not even required in newly-manufactured American automobiles until 1967. *See* Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post*-Cipollone*: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 143-44 (1994).

The gravity of the offense is an important factor in determining the reasonableness of a search or seizure. *See, e.g.*, *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring). Not wearing a seat belt is obviously less grave of an offense than attempted robbery, malicious wounding, or burglary of a home, all crimes involving direct attacks on the rights of others. *Cf. Winston v. Lee*, 470 U.S. 753, 755-56 (1985); *Tennessee v. Garner*, 471 U.S. 1, 4 (1985). It also is less serious than drunk driving, which poses a threat to all others on the road. *Cf. Welsh*, 466 U.S. at 755 (Blackmun, J., concurring). It is even less significant than a failure to use a turn signal. *Cf. Whren v. United States*, 517 U.S. 806, 810 (1996).

Finally, the penalty for violating the seat belt law is minimal: a fine ranging from $25 to $50 is authorized. Tex. Transp. Code Ann. § 545.413(d) (West 1999). The Texas Legislature intended for the fine to be *the only penalty* for not wearing a seat belt, not custodial arrest and subsequent incarceration. *See Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 134 (Tex. 1994) (the statutory fine was meant

to be "the sole legal sanction for the failure to wear a seat belt"). Texas even bars evidence of the use or non-use of seat belts in civil litigation. Tex. Transp. Code Ann. § 545.413(g) (West 1999). "[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984). As evidenced by the penalty imposed for a violation of the seat belt law, the governmental interest in the law's enforcement is relatively slight.

2. The custodial arrest furthered no legitimate law enforcement objective that could not also have been accomplished by issuing a citation

Even if the government had a stronger interest in enforcing the seat belt laws, a custodial arrest would not advance that interest. "The most common purpose of arrest is to bring an actual or supposed criminal into court for investigation or trial or to subject a convict to the penalty previously imposed upon him by a competent tribunal." Rollin M. Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 202 (1940). These and other justifications for a custodial arrest usually do not apply to traffic violations.

Because the traditional justifications for custodial arrests do not apply to most traffic offenses, issuing citations is the preferred method for enforcing most traffic laws. "It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law." American Bar Association, *Standards for Criminal Justice*, § 10.2-1 (2d ed. 1980). Academics have made the same recommendation. *See, e.g.*, 3 Wayne R. LaFave, *Search and*

Seizure § 5.2(g), at 91 (3d ed. 1996); Salken, *supra*, at 249 (1989); Arthur Mendelson, *Arrest for Minor Traffic Offenses*, 19 Crim. L. Bull. 501, 503 (1983).

In addition, approving the use of custodial arrests for fine-only traffic offenses such as seat belt laws is counter to the governmental interest in enforcing traffic laws: it raises the stakes of the "routine" traffic stop, increasing the potential danger to police officers. People should not fear police, whose job it is to protect them. But if police have the unfettered discretion to arrest anyone for even the slightest criminal infraction, that will engender fear of police. Currently the expectation of most drivers is that a traffic stop will be brief. Because of this, traffic stops are less adversarial than custodial arrests. "The threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest." *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

If the decision below is approved by this Court, that may change. Every driver who sees the flashing lights of a police car in the rear view mirror will have cause to wonder if this will be the officer who decides to handcuff and take the driver to jail. Drivers will wonder if they will spend the next two days in jail, and their behavior will reflect this.

3. No special circumstances were present in this case to make a custodial arrest necessary or reasonable

Various factors may arise in individual traffic stops that conceivably could make the increased governmental intrusion of a custodial arrest "reasonable." No such factors were present in this case. The custodial arrest did nothing to further "the

community's interest in fairly and accurately determining guilt or innocence." *Winston v. Lee*, 470 U.S. 753, 762 (1985).

A custodial arrest was not necessary to secure an appearance in court for the seat belt violation. Ms. Atwater – known by the officer to be a local resident, wife of an emergency room physician, and mother of two young children – posed no risk of flight. Likewise, Officer Turek confirmed that she was a licensed driver after she presented him with her Texas driver's license number. (R. 386). Once the officer had made the stop, he had obtained all the evidence necessary for prosecution of the offense. *See Knowles*, 525 U.S. at 118. Ms. Atwater's signature on a citation, promising to appear, was all that was needed to insure enforcement of the law.[15]

Similarly, there was no indication that Ms. Atwater would have refused to belt herself and her children once her non-compliance was cited. In fact, the record strongly indicates the opposite: she was telling her children that they were wrong and that they all should have been wearing their seat belts. (R. 384). But Ms. Atwater was not given the chance to sign a promise to appear: Officer Turek *immediately* announced his decision to place her under custodial arrest. (R. 382). Whatever his motivation, from the moment Officer Turek

[15] The Fourth Amendment does not *always* mandate the least intrusive law enforcement practice, *see, e.g., Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983), as when the less intrusive practice poses significant difficulties in its application. But here, what happens to be a "less intrusive" means for enforcing the seat belt law is also the easiest, cheapest, most commonly used, most effective, in short, *the best* means as well.

stopped Ms. Atwater's truck, he made it clear that he intended to take her to jail.[16]

Finally, any of the sort of aggravating circumstances that can cause a traffic stop to "escalate" were wholly lacking in this case. Gail Atwater was not intoxicated or using illegal drugs. There were no outstanding warrants for her arrest. She was not a repeat offender.[17] Ms. Atwater was at all times cooperative and polite, even when Officer Turek's yelling made her children begin to cry. (R. 388-89, 414). There was no indication that Ms. Atwater was armed, or that she posed any threat to the officer's safety. In short, none of the common justifications given for custodial arrests were present in this case. All legitimate law enforcement objectives could have been accomplished by issuing a citation. In the balancing of interests, the respondents' side of the scale is empty.

As the court below erred by refusing to engage in an historical inquiry, so, too, did it err by not balancing the competing interests of the individual and government as mandated by this Court's decisions. Other lower courts have not shirked this responsibility when faced with a custodial

[16] Not surprisingly, Officer Turek's performance review indicates that he led his department in misdemeanor arrests. (R. 653).

[17] At various stages in this litigation, the respondents have mischaracterized Gail Atwater as having previously violated the seat belt law. *See, e.g.*, Brief of Appellees at 3, *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999) (No. 98-50302). There is not evidence in the record so indicating. Ms. Atwater had been stopped by Officer Turek a few weeks before the episode that gave rise to this case, but her children were restrained on that occasion and no citation was issued. (R. 379, 405, 703-07).

arrest for a traffic violation. *See, e.g., State v. Jones*, 727 N.E.2d 886, 892-95 (Ohio 2000); *State v. Harmon*, 910 P.2d 1196, 1201-04 (Utah 1995). Under the circumstances of this case, the balancing of the competing interests leads to the same result that would have been reached under common law rules, themselves the result of a balancing of interests: the custodial arrest of Gail Atwater was an unreasonable seizure.

III. The Court Below Erred by Creating a Broad *Per Se* Rule that Probable Cause Without More Justifies *Any* Custodial Arrest, Regardless of the Offense

The Fifth Circuit announced a broad new rule that probable cause is the only Fourth Amendment restriction on a seizure of a person. Such a rule, when applied to minor traffic offenses, cannot be squared with the events that led to the Fourth Amendment's adoption or with any balancing of the competing interests of the individual and law enforcement. Additionally, this Court has never recognized such an unqualified rule, which ignores and even undercuts other decisions of this Court.

A. The Court of Appeals' Reliance on *Whren v. United States* Was Misplaced

The Fifth Circuit relied on language in *Whren v. United States*, 517 U.S. 806 (1996), concluding that any custodial arrest was reasonable so long as there is probable cause, ignoring the character of the offense. *See* 195 F.3d at 244-46, Pet. App. A at 4a-7a. The court below focused on the following passage:

> Where probable case has existed, the only cases in which we have found it necessary to perform the 'balancing' analysis involved searches or seizures

> conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.

Whren, 517 U.S. at 818 (citations omitted). There are several reasons why reliance on this passage was incorrect.

First, *Whren* did not address the constitutionality of a custodial arrest, but rather of a temporary detention – a traffic stop – based on probable cause to believe that a traffic violation had been committed. *Whren*, 517 U.S. at 808. The *Whren* petitioners contended that a traffic stop should only be permitted if a hypothetical police officer, "acting reasonably, would have made the stop for the reason given." *Whren*, 517 U.S. at 810. This Court unanimously rejected that argument as a thinly-veiled effort to avoid the Court's repeated rejections of efforts to scrutinize officers' objective intent. 517 U.S. at 811-12. All that was before this Court in *Whren* was the constitutionality of a traffic stop, not the custodial arrests that followed.

Second, the custodial arrests in *Whren* were not traffic arrests, but drug arrests based on probable cause. The vehicle occupants were arrested for possession of narcotics after the officer approached the vehicle and saw the passenger holding in plain view two large bags of what appeared to be crack cocaine. *Whren*, 517 U.S. at 808-09. The officers who made the arrests in *Whren* were plainclothes "vice-squad officers" patrolling in a "high drug area." *Id.* at 808. The officers had observed a vehicle with temporary plates that had stopped for an unusually long time at a stop sign, for no apparent reason. *Id.* The vehicle then drove away when the police car made a U-

turn and approached. *Id.* The petitioners contended that the stop and ultimate arrests were for a traffic violation in the hope that this Court would announce a rule that prohibited "pretextual" traffic stops. *Id.* at 810, 811-12. However, the facts in *Whren* arguably were sufficient to justify a brief detention based on reasonable suspicion apart from any traffic violation. *See United States v. Cortez*, 449 U.S. 411, 417-18 (1981).

Finally, the custodial arrest of Gail Atwater *was* extraordinary. A custodial arrest is admittedly less of an intrusion than a physical penetration of the body, and based on precedent, entries into the home are treated as greater intrusions than physical incarceration of one's person. But what constitutes an "extraordinary" seizure is relative to the crime at issue. The infraction for which Ms. Atwater was arrested is much less serious than the offenses in the decisions listed by this Court in *Whren* as involving "extraordinary" intrusions: drunk driving,[18] burglary,[19] armed robbery,[20] or trafficking in narcotics.[21] The nature and quality of an intrusion on an individual's Fourth Amendment interests must be balanced "against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983); citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976)). The degree of the governmental intrusion on Gail Atwater was

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[18] *Schmerber v. California*, 384 U.S. 757, 758 (1966).

[19] *Tennessee v. Garner*, 471 U.S. 1, 5 (1985).

[20] *Winston v. Lee*, 470 U.S. 753, 755 (1985).

[21] *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

just as extraordinary as the intrusions in the cases listed in *Whren*, when the basis for the governmental intrusion – enforcing the seat belt law – is considered.

Indeed, even the Solicitor General has indicated that, after making a traffic stop based on probable cause to believe that a traffic violation has occurred, it is extraordinary to do more than issue a ticket, absent some indication of other ongoing criminal activity:

> Once a police officer has completed his investigation and citation of the traffic offense that gave rise to the stop, the motorist must be permitted to leave, unless the officer has by that time developed reasonable suspicion that the motorist has committed or is committing another offense. *See United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998); [*United States v. McRae*, 81 F.3d 1528, 1535 (10th Cir. 1996)]. A reasonable suspicion to continue to detain a motorist requires a 'particularized and objective basis for suspecting the person stopped of criminal activity,' *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (internal quotation marks omitted), in additional to the original traffic offense.

Brief for the United States in Opposition at 9-10, *Potts v. United States*, No. 98-2000. In *Potts*, the police officer stopped the vehicle after it had changed lanes without signaling and it had been speeding; there was no question the officer had probable cause to believe that these offenses had occurred. *United States v. Potts*, 173 F.3d 430, 1999 WL 96756 (6th Cir. Feb. 2, 1999) (unpublished disposition). If probable cause to believe a traffic offense has occurred were alone sufficient to justify a custodial arrest, then the issue of whether a traffic stop lasts too long – a much less significant governmental intrusion

than a custodial arrest – would rarely, if ever, be a concern.

B. *United States v. Watson* Upheld Only Warrantless *Felony* Arrests, and its Analysis Supports Petitioners' Position

The Fifth Circuit also ignored this Court's anaysis in *United States v. Watson*, 423 U.S. 411 (1976). *Watson* dealt with the validity of a warrantless felony arrest based on probable cause. *Watson*, 423 U.S. at 415-16. The *Watson* Court did not take for granted that probable cause was sufficient to justify a warrantless felony arrest. Instead, the Court carefully reviewed common-law authorities to determine if a warrantless felony arrest was proper when the Fourth Amendment was adopted. Like *Watson*, the instant case involves a warrantless custodial arrest. The *Watson* analysis, therefore, should be applied here.

The *Watson* opinion contains a broad statement indicating that probable cause would also be sufficient to justify a warrantless arrest for a misdemeanor: "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *Watson*, 423 U.S. at 418. But the authorities cited to support this statement either address only felony arrests[22] or note the common-law rule

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[22] *See Samuel v. Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K.B.1780); *Beckwith v. Philby*, 6 Barn. & Cress. 635, 638-39, 108 Eng. Rep. 585, 586 (K.B.1827); *Kurtz v. Moffitt*, 115 U.S. 487, 504 (1885); *Rohan v. Sawin*, 59 Mass. (59 Cush.) 281, 284 (1850); *Wakely v. Hart*, 6 Bin. 316, 318 (Pa.1814); *Holley v. Mix*, 3 Wend. 350, 350 (N.Y. Sup. Ct.1829); *State v. Brown*, 5 Del. (5 Harr.) 505,

limitting arrest authority to breach-of-the-peace misdemeanors.[23]

Instead, the analysis and holding of *Watson* demonstrate that an arrest that meets the common law standards satisfies Fourth Amendment requirements. As the *Watson* Court stated, a "balance [was] struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant." *Watson*, 423 U.S. at 421. The common law struck a different balance depending on the nature of the offense. The arrest in *Watson* satisfied the common law rules. The arrest in this case does not.

C. The Decision Below Abrogates the Automobile Exception by Permitting Warrantless Vehicular Searches *Without* Probable Cause that a Vehicle Contains Contraband

Although the Fifth Circuit's decision purports to place importance on probable cause, the ironic effect of the holding

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507 (Ct. Gen. Sess. 1853); *Johnson v. State*, 30 Ga. 426, 426, 429-30 (1860); *Wade v. Chaffee*, 8 R.I. 224, 225 (1865); *Reuck v. McGregor*, 32 N.J.L. 70, 74 (Sup. Ct.1866); *Cf. Baltimore & O. R. Co. v. Cain*, 81 Md. 87, 100, 102, 31 A. 801, 803, 804 (1895) (stating that "[i]t is settled that an officer has the right to arrest without a warrant for any crime committed within his view," but the issue before the court was whether a non-police officer could arrest without a warrant for breach of the peace).

[23] 10 *Halsbury's Laws of England* 344-345 (3d ed. 1955); 4 W. Blackstone, Commentaries *292; 1 J. Stephen, *A History of the Criminal Law of England* 193 (1883); 2 M. Hale, Pleas of the Crown *72-74; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924).

is to dispense with probable cause altogether for warrantless searches of automobiles. If custodial arrests were permitted for any fine-only traffic offense, then there would no longer be a probable cause requirement for application of the "automobile exception."

Seventy-five years ago, this Court recognized the "automobile exception" to the warrant requirement, holding that a warrantless search of a motor vehicle based on probable cause satisfied the Fourth Amendment's reasonableness requirement. *See Carroll v. United States*, 267 U.S. 132, 153 (1925). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (citing *California v. Carney*, 471 U.S. 386, 393 (1985)).

If the decision below is affirmed, police will not only be permitted to search vehicles "without more," they will be allowed to search vehicles with *even less*. "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *New York v. Belton*, 453 U.S. 454, 460 (1981). If custodial arrests are allowed for all minor traffic offenses, the automobile exception's probable cause requirement will have been effectively jettisoned.

This is true, of course, whenever police conduct a warrantless arrest: they are then permitted to conduct a warrantless search incident to the arrest. The probable cause that justifies the arrest essentially transfers to support the warrantless search when there may have been no probable cause to justify the search alone. This is palatable when there is probable cause that a serious crime has been committed, but

much less so when the offense for which the arrest is made is merely a minor traffic offense. The fact that a citizen happens to violate a traffic law is no indication of any other criminal conduct. This Court has observed that "the *Carroll* doctrine does not declare a field day for the police in searching automobiles." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973). If the decision below is left intact, the field day will have been declared.

D. The Court of Appeals' Ruling Undermines this Court's Decision in *Knowles v. Iowa*

Finally, the decision below undermines this Court's recent decision in *Knowles v. Iowa*, 525 U.S. 113 (1998). *Knowles* held that a police officer cannot search a car following a traffic stop when the officer issues a traffic citation and does not place the driver under custodial arrest. *Knowles*, 525 U.S. at 114. The decision below undermines *Knowles* in two respects.

First, the Fifth Circuit nullifies any protection *Knowles* provides against full searches incident to arrest. Any officer wishing to avoid the holding of *Knowles* need only place the driver under custodial arrest for the traffic violation, and thereafter search the vehicle and driver as a search incident to arrest. *See United States v. Robinson*, 414 U.S. 218 (1973). If the decision below is allowed to stand, *Knowles* will cease to provide any protection to the average citizen. Indeed, a zealous officer will have an incentive to make custodial arrests in order to expand the scope of permissible searches.

Second, unless the decision below is reversed, *Knowles* will be meaningless when read against this Court's earlier decisions addressing searches incident to arrest. This Court has held that when a police officer has probable cause to believe an

offense has occurred for which an arrest may be made, the search incident to the arrest can be conducted either before or after the actual arrest. *See, e.g., Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980); *Peters v. New York*, 392 U.S. 40, 40-43 (1968). Thus, unless limitations are placed on when custodial arrests may be used for traffic offenses, avoiding the holding of *Knowles* becomes a matter of timing: a police officer may simply search the vehicle first, and if contraband is found, declare that the driver has been arrested for the traffic violation, thereby justifying the search after-the-fact. The officer also then avoids the trouble of actually making the custodial arrest unnecessarily[24] but accomplishes the desired search. As Professor LaFave has explained, "if *Rawlings* is not to undo *Knowles*, it will be necessary for the Court to find some way to avoid its use in the manner just suggested." 3 Wayne R. LaFave, *Search and Seizure* § 5.2, at 16 (3d ed. 2000 Supp.).[25] Prohibiting the use of custodial arrests for fine-only traffic offenses absent extraordinary circumstances would solve this dilemma.

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[24] Because of this, the systemic disincentives to making custodial arrests, raised by the respondent in *Ricci* as a reason for not placing limits on the use of custodial arrests for minor offenses, will not deter a police officer who wishes to conduct a thorough search of a vehicle or person. *See* Respondent's Brief at 15, *Ricci v. Village of Arlington Heights*, No. 97-501, 1998 WL 134006. Significantly, the respondent in *Ricci* essentially conceded that it would be proper to require citations rather than custodial arrests for traffic offenses. *Id.* at 16.

[25] *See also* Wesley M. Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tulane L. Rev. 1409, 1453 (2000) ("The unanimous decision in *Knowles* simply would make no sense if probable cause to believe an offender had committed a traffic offense alone justified taking him into custody.").

IV. This Case Lends Itself to Articulating More Clearly the Permissible Boundaries of When a Custodial Arrest May Be Used for Fine-Only Traffic Offenses

It would not be necessary to announce a general rule in this case in order to determine that the court below erred. The specific circumstances of this case make clear that the custodial arrest of Gail Atwater for violating the seat belt law was unreasonable under the Fourth Amendment. The arrest furthered no legitimate law enforcement interests. It would not be inappropriate to leave to the lower courts the task of determining if and when custodial arrests for other minor traffic offenses, under different circumstances, comply with the Fourth Amendment. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) ("[W]e leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment."). Indeed, this Court often has eschewed bright-line rules in Fourth Amendment settings. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Nevertheless, this Court has not hesitated to provide guidance to police officers and the public when appropriate. As the Court has explained in setting forth a general rule, "Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *see also Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998). This is a case that lends itself to establishing those boundaries.

Both the extreme intrusion of custodial arrests on law-abiding Americans, and the literally millions of traffic stops that occur every year, make it desirable to articulate the limits on when custodial arrests may be used for traffic offenses. While in some instances, a wide array of approaches in different regions makes sense, that is not true here. For

uniformity, to avoid arbitrary exercises of discretion, and to avoid the likelihood of future Fourth Amendment violations, Petitioners suggest the following rule:

> The Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road.

Issuing traffic citations is already the most common method for enforcing fine-only traffic offenses. Custodial arrests, on the other hand, are rare. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 434 (1984). The proposed rule preserves the common-law distinction between lesser and more serious offenses, but does so without reliance on terms such as "misdemeanor," "felony," or "breach of the peace," which have definitions that vary widely in different jurisdictions and differ substantially from their common-law meanings. *See United States v. Watson*, 423 U.S. 411, 440 n.9 (1976) (Marshall, J., dissenting) (listing federal statutes making offenses felonies that were misdemeanors at common law).

Furthermore, the proposed rule curbs unfettered discretion in conducting searches and seizures of the over 185 million Americans drivers for fine-only offenses that are only marginally criminal. Such limitations on police discretion are good for both the police and the public. *See* Amicus Curiae Brief of the Institute on Criminal Justice at the University of Minnesota Law School *et al.* The proposed rule limits discretion, however, without thwarting legitimate law enforcement objectives. Arrests would still be permitted for drunk driving and other offenses that will continue to pose a danger to others if the driver is not detained. Similarly, it would permit custodial arrests in cases when the officer cannot

ascertain the driver's identity, thus ensuring effective enforcement of traffic offenses.

Finally, the proposed rule leaves police with ample room to detect other more serious crimes.[26] Police will still be able to do any of following during a traffic stop:

- With probable cause to believe that a motor vehicle contains contraband, police may stop and search a vehicle without first obtaining a warrant as thoroughly as a magistrate could authorize. *See United States v. Ross*, 456 U.S. 798, 823 (1982).

- Police may order a driver to exit the vehicle and conduct a protective "frisk" of the driver's person for weapons. *See Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

- Police also may order any passengers to exit the vehicle, and frisk them as well. *See Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

- Police may demand to inspect the VIN, and remove any objects obscuring the view of it. *See New York v. Class*, 475 U.S. 106, 115, 118-19 (1986).

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[26] The potential that *other* crimes might not be discovered if police are not permitted to arrest for any traffic offense is not a legitimate part of the Fourth Amendment inquiry. To consider the government's interest in enforcing crimes other than the one for which the arrest was made is to allow the effect of the exclusionary rule – which is a Fourth Amendment *remedy* – to impact the *substance* of the Fourth Amendment. Nevertheless, this concern may have motivated the Fifth Circuit in reaching its result.

- To insure their safety, police may conduct a limited search of the vehicle's interior, including the passenger compartment and any closed containers in the area, to ensure no weapons are present, if there are reasonable grounds to believe that their safety is threatened. *See Michigan v. Long*, 463 U.S. 1032, 1049-51 (1983).

- Police may seize, without a warrant, any contraband they encounter in "plain view" while conducting the above searches, and arrest the driver or passengers based on the probable cause developed from that discovery. *See Texas v. Brown*, 460 U.S. 730 (1983).

- Police may question a driver and passengers regarding unrelated criminal activity without first warning them of their right to remain silent. *See Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984).

- Police may seek and obtain a driver's consent to conduct more expansive searches, and are not required to tell the driver that he or she need not consent. *See Ohio v. Robinnett*, 519 U.S. 33, 36, 39-40 (1996).

- Police may have a drug-sniffing dog circle the vehicle to ascertain the presence of drugs. *See United States v. Place*, 462 U.S. 696, 707 (1983) (drug sniffing dog sniffing luggage not a search); *but see Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), *cert. granted*, No. 99-1030 (Feb. 22, 2000).

In short, police officers making traffic stops have at their disposal abundant powers to detect crimes, other than traffic violations, that may be occurring.

"An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Delaware v. Prouse*, 440 U.S. 648, 662 (1979). Having the discretion to take the actions listed above provides police with ample opportunities to uncover any other criminal activity. In the case of Gail Atwater, of course, there was no other criminal activity. Allowing police to retain the broad discretion to arrest granted them by the Fifth Circuit will not further detection of other crimes. It will simply, when exercised, constitute a severe and arbitrary governmental intrusion on otherwise law-abiding citizens who happen to violate minor traffic laws.

V. Conclusion

History, balancing the competing interests of the individual and government, and faithfully following this Court's precedents all demonstrate that Gail Atwater's Fourth Amendment rights were violated. Petitioners therefore respectfully pray that the Court reverse the court of appeals' *en banc* decision, and remand this case to the district court for trial.

Respectfully submitted,

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In The

Supreme Court of the United States

GAIL ATWATER, Individually, and MICHAEL HAAS, as Next Friend of ANYA SAVANNAH HAAS and MacKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK and FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Did the Fourth Amendment require Officer Turek to release Petitioner with a citation and a promise to appear rather than arresting her, when the officer observed Petitioner violating Texas seat belt and child restraint statutes and when Petitioner failed to produce a drivers' license or proof of insurance, simply because none of the charges could be punished by jail time, when Petitioner was held at the police station for approximately one hour and promptly received a hearing with a magistrate?

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STATEMENT

1. Facts.

On March 26, 1997 in Lago Vista, Texas, Officer Bart Turek was driving east on Dawn Drive when he met a 1993 Dodge Ram pickup truck being driven in the opposite direction by Petitioner Gail Atwater. Officer Turek saw that Ms. Atwater's three-year-old son MacKinley was standing in the front seat, leaning against the dashboard, and that neither MacKinley, the Petitioner, nor her five-year-old daughter Anya were wearing seat belts, as required by Tex. Trans. Code §§ 545.412, 545.413. R. 380. Officer Turek recognized Petitioner since he had stopped her "several months before" when she had MacKinley seated on an armrest in the front seat of the truck (R. 703), which she acknowledged was unsafe. (R. 379.)

After stopping her, Officer Turek approached Petitioner and, according to her testimony, yelled something to the effect of, "we've had this conversation before, we've met before" and then said "you're going to jail." (R. 703.) Officer Turek then told Petitioner to move her truck to a safer location and return to his police car. Both vehicles were moved off the street. (R. 384.)

While the vehicles were being moved, Ms. Atwater, in an effort to calm her children, told them, "Your mother is wrong. You should have been in your seat belts. He is doing his job. He is trying to protect you." (R. 384.)

After the vehicles were moved, Officer Turek again approached Petitioner's truck and asked to see her driver's license and proof of insurance. (R. 704.) Although Petitioner was required to possess both while

operating the pickup truck,[1] she had neither. (R. 382, 704.) She testified that they were in a purse stolen in an Austin theater several days before. (R. 382-83.) Officer Turek called for another officer to come to the scene, called for a tow truck to take Petitioner's pickup to a secure and locked facility, and arrangements were made for a friend of Petitioner who lived nearby to care for Anya and MacKinley. (R. 421.)

After the second officer, the tow truck, and the friend arrived, Ms. Atwater was for the first time touched by Officer Turek, when he put handcuffs on her and helped her into the back seat of his patrol car. (R. 386.) Petitioner was taken directly to the Lago Vista police station, the handcuffs were removed, her purse was taken and the contents inventoried, her eyeglasses were removed and her shoes were taken. (R. 386, 706.) Petitioner was held alone in a holding cell for about an hour until the part-time municipal court judge arrived. (R. 706.) At the hearing, a bond of $310 was set and Ms. Atwater was released. (R. 388, 424.)

There is no evidence Petitioner was touched other than when handcuffs were put in place. The Petitioner was never searched other than having her purse emptied and the contents inventoried at the police station. There is no complaint that the pickup was searched.

Petitioner was subsequently convicted of three counts of violating the restraint statutes. The driver's license and proof of insurance charges were dismissed when she produced evidence that she had a valid license

[1] Tex. Trans. Code §§ 521.025, 601.053.

at the time of the arrest and had the necessary insurance in place.

2. Proceedings Below.

Petitioner filed her claims against Respondents under 42 U.S.C. §§ 1983 and 1985. The United States District Court for the Western District of Texas granted Respondents' Motion for Summary Judgment (R. 681-89). A panel of the United States Court of Appeals for the Fifth Circuit reversed, 165 F.3d 380 (5th Cir. 1999) (Appendix B to Petition for Writ of Certiorari), and the panel's decision was overturned by that court sitting *en banc*, 195 F.3d 242 (5th Cir. 1999) (Appendix A to Petition for Writ of Certiorari).

3. Texas Statutory Scheme.

Texas requires all adults to secure themselves and all children riding in the front seat of a vehicle with seat belts or a child protective device, and imposes a maximum fine of $50 per violation. Tex. Trans. Code §§ 545.412, 545.413. The State also requires all persons operating motor vehicles on public roads to have with them a valid driver's license, violation of which is punishable by a fine of up to $200 on first offense, *id.* § 521.025, and to have proof of liability insurance on the vehicle, *id.* § 601.053, violation of which is punishable by a fine of up to $350 on first offense, *id.* § 601.191.

Texas authorizes police officers to arrest a person "found committing a violation" of the statutes involved here. Tex. Trans. Code § 543.001. The offending conduct

must take place in the officer's presence. *Soileau v. State*, 244 S.W.2d 224, 225 (Tex. Cr. App. 1951); *Drago v. State*, 553 S.W.2d 375, 377 (Tex. Cr. App. 1977).

After the arrest, the officer can choose to release "the person arrested" if the person makes "a written promise to appear in court," Tex. Trans. Code § 543.005, or can have the person "immediately taken before a magistrate" who has jurisdiction and who "is nearest or most accessible to the place of arrest" for the purpose of determining the collateral necessary to secure the person's appearance at trial. Tex. Trans. Code § 543.002.

SUMMARY OF ARGUMENT

This Court has continually held that the touchstone for evaluating whether a seizure was proper under the Fourth Amendment is probable cause. Of those arrests made with probable cause, only those that are unreasonable in manner or duration will be invalidated. In evaluating reasonableness under the seizure clause when probable cause existed, the Court looks to whether the arrest was accomplished in an extraordinary manner, unusually harmful to an individual's privacy or physical interest. The reasonableness is measured by an objective standard, not by the arresting officer's subjective state of mind.

Gail Atwater was observed violating Texas' mandatory seat belt and child restraint laws, and she failed to produce a valid driver's license or proof of insurance, as required by state law. The arresting officer personally observed these offenses. Nothing unusually harmful to

Ms. Atwater is involved here. As part of a typical brief arrest, she was handcuffed and transported to the police station, where she was held for about an hour while she waited for the part-time magistrate to come to the police station to determine the security for her appearance at trial. The brief detention advanced legitimate law enforcement objectives of enforcing traffic safety laws and ensuring Ms. Atwater's appearance at trial, and the arrest was not overly intrusive.

Petitioners maintain that more than probable cause should be required in some, but not all, cases of violation of fine-only laws. This position confuses the purposes of arrest and punishment, is unsupported by this Court's precedent, and invites uncertainty along with differing meanings of the Fourth Amendment among the many jurisdictions of the Nation. Taking an offender before a magistrate for setting of security for appearance is a long-accepted and logically sound law enforcement practice. The Constitution does not require abandonment of this practice in cases such as that presented here.

The fears of discriminatory practices such as "racial profiling" outlined by Petitioners and their *amici* do not justify adopting the prophylactic constitutional rule they suggest. This Court has observed that such practices are forbidden by the constitutional guarantee of equal protection. Nor does authorizing brief arrests for observed violations of traffic safety laws amount to a "general warrant," because arrests still may be made only on particularized determination of probable cause based on observed conduct.

The Fourth Amendment does not incorporate a common law rule limiting warrantless misdemeanor arrests to instances that constitute a breach of the peace. Such rules were subject to legislative alteration since the framing of the Constitution (and even earlier), and have been rejected by states for decades if not centuries. To the extent the common law of warrantless misdemeanor arrest is incorporated into the Fourth Amendment, the only surviving requirement is that the misdemeanor be committed in the presence of the arresting officer, which requirement is met here.

ARGUMENT

THE ARREST AND BRIEF CUSTODY OF PETITIONER WAS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT WAS SUPPORTED BY PROBABLE CAUSE AND WAS NOT CARRIED OUT IN AN EXTRAORDINARILY INTRUSIVE MANNER.

A. This Court's precedent establishes probable cause as the touchstone for evaluating whether a seizure comports with the Fourth Amendment's reasonableness requirement.

The Fourth Amendment commands that seizures (including arrests) must be reasonable. This command is met when a police officer arrests a person in a public place based on probable cause to believe the arrestee has violated a criminal statute, as long as the arrest is reasonable in manner and duration. More than a half century

ago, this Court noted that the "long-prevailing standards"[2] of probable cause embodied "the best compromise that has been found for accommodating [the] often opposing interests" in "safeguard[ing] citizens from rash and unreasonable interferences with privacy" and in "seek[ing] to give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949), as quoted in *Dunaway v. New York*, 442 U.S. 200, 208 (1979). A "single, familiar standard" such as probable cause "is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-14. Indeed, the Court has stated plainly that "[a] police officer may arrest a person if he has probable cause to believe that person committed a crime." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

The need for a familiar standard that represents an *a priori* consideration of the need for effective law enforcement and personal privacy is especially acute when, as in this case, the offense was witnessed by the officer. In such circumstances, "a policeman's on-the-scene assessment of probable cause provides a legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

Only in the most extraordinary of circumstances has the Court required more than probable cause to justify a

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[2] In light of the history of the probable cause standard, Petitioners' characterization of the Fifth Circuit's decision as a "broad new rule," Pet. Br. at 36, is incorrect.

seizure. In these rare cases, the highly intrusive nature of the particular seizure at issue – not any type of allegedly diminished interest in law enforcement based on the nature of the offense or the possible penalty it carries – is the factor that limits police officers' right to make a seizure. *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (unannounced entry into a home); *Welsh v. Wisconsin*, 466 U.S. 740 (1884) (entry into a home without a warrant); *Winston v. Lee*, 470 U.S. 753 (1985) (physical penetration of the body).

The Court rejected the application of a "probable cause plus" standard, much like that advanced by Petitioner here, in *Whren v. United States*, 517 U.S. 806 (1996). The defendants in *Whren* had committed traffic offenses and were stopped by plain-clothes vice officers, allegedly contrary to usual police practices; after the stop, the officers observed crack cocaine in the truck and arrested the occupants. *Whren*, 517 U.S. at 808-09, 813-14. Whren and his accomplices maintained that a seizure following an observed violation of a traffic law violated the Fourth Amendment unless a reasonable officer would have made the stop. *See id.* at 814-15. The defendants contended that under the circumstances presented, the governmental interest in enforcing traffic laws was not sufficient to justify an invasion of personal privacy based only upon probable cause. *Id.* at 816-17.

In rejecting Whren's argument, the Court noted:

> It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause. . . .
>
> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests. . . . The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" private interest in avoiding police contact.

Whren, 517 U.S. at 817-18. In other words, when the seizure at issue does not involve extraordinary intrusiveness beyond a typical arrest or detention, there is no need for any type of "balancing" not already embodied in the probable cause requirement, which itself represents an established, predictable balancing between the interests implicated by the Fourth Amendment's reasonableness requirement.

The extraordinary cases cited by the *Whren* Court all involved intrusions much more extensive than the brief arrest and detention of Ms. Atwater. In *Tennessee v. Garner*, 471 U.S. 1 (1985), an unarmed teenager fleeing the scene of a burglary was shot and killed by police, which was held to be an unreasonable seizure. In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Court held that in some

circumstances, police are required by the Fourth Amendment to knock and announce themselves before searching a residence – an act more invasive than a brief arrest of a person in a public place. *Welsh v. Wisconsin*, 466 U.S. 740 (1984), held that in light of the fact that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,' " *id.* at 748, a warrantless arrest after a warrantless entry of a home was unconstitutional under the circumstances. And in *Winston v. Lee*, 470 U.S. 753 (1985), the Court held that a suspect would not be required to undergo surgery, under general anesthesia, to remove a bullet that might have evidentiary value.

The Court also has rejected a "balancing" argument contending that law enforcement officials should be able to effect what amounted to an arrest based on something *less* than probable cause. In *Dunaway v. New York*, 442 U.S. 200 (1979), a murder suspect was taken to a police station for questioning without probable cause. The State of New York maintained that the detention and custodial interrogation comported with the Fourth Amendment because police had "reasonable suspicion," which the State alleged was sufficient under a "balancing" analysis. *Id.* at 211-12. The Court disagreed, holding that the established probable cause standard was appropriate.

> The standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest "reasonable" under the Fourth Amendment. The standard applie[s] to all arrests, without the need to "balance" the

> interests and circumstances involved in particular situations.

Dunaway v. New York, 442 U.S. at 208. *Whren* and *Dunaway* establish that in cases of typical arrests, probable cause is the constitutional standard, and neither more nor less is required to justify a seizure.

Here, Petitioners do not contend that the arrest of Ms. Atwater was accompanied by conduct that constituted intrusiveness beyond any of the thousands of custodial arrests that take place every day. Her arrest was extraordinary only in its typicality; she was held at the police station for an hour or less and was seen by a magistrate at the earliest possible opportunity. Rather, Petitioners' only claim is that the arrest violated the Fourth Amendment because Ms. Atwater's offenses – unquestioned though they be – were of insufficient gravity to justify a custodial arrest, no matter how typical or brief.[3]

This Court has never invalidated a run-of-the-mill arrest based on probable cause because the offense was allegedly too minor, and Petitioners have presented no logical reason or precedent to support their desired result.

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[3] *See* Pet. Br. at 38-39.

B. Even if a balancing of interests were proper in this case, the government's legitimate interest in ensuring effective enforcement of traffic safety laws justified the arrest and brief detention.

Because of the absence of extraordinary intrusiveness, the arrest of Ms. Atwater is constitutionally reasonable because it was supported by probable cause. Petitioners argue otherwise based primarily not on governmental intrusiveness, but rather on the perceived magnitude of the offenses. The lynchpin of Petitioners' argument is that the government's interest in the effective enforcement of traffic safety laws is not sufficiently meaningful to justify the brief custodial arrest of Ms. Atwater. This argument misapprehends the state's interest in protecting those on the highway – particularly young children – from death or serious injury, and ignores the utility of the procedure here at issue for ensuring that the laws are obeyed and violations are effectively punished.

1. The government has a legitimate and compelling interest in enforcing traffic safety laws.

In 1998, 41,471 people were killed in 6,334,000 reported motor vehicle accidents in the United States.[4] Of these, 575 were children under the age of five years, 293 of whom, like Ms. Atwater's children, were unrestrained

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[4] "Traffic Safety Facts 1998 – Overview," U.S. Department of Transportation, National Highway Safety Administration, DOT HS 808 956 (available online at <www.nhtsa.dot.gov/people/ncsa/pdf/Overview98.pdf>).

by seat belts.[5] More than 3.4 million injuries were documented in police-reported crashes in 1995.[6] Nearly a thousand children are injured in car crashes every day in this country; if all children were properly restrained while in vehicles, five hundred children each day would be spared serious injury.[7] Seat belts are estimated to save 9,500 lives each year, and statistics show a higher degree of seat-belt use in states that aggressively enforce seat belt laws.[8]

Before the arrest here at issue, Ms. Atwater was stopped by Officer Turek on an occasion in which her three-year-old son was sitting on the armrest of her pickup truck, in a manner that Ms. Atwater acknowledges was unsafe, and was warned by Officer Turek. (R.

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[5] "Traffic Safety Facts 1998 – Children," U.S Department of Transportation, National Highway Traffic Safety Administration, DOT HS 808 951 (available online at <www.nhtsa.dot.gov/people/ncsa/pdf/child98.pdf>).

[6] "Presidential Initiative for Increasing Seat Belt Use Nationwide: Recommendations from The Secretary of Transportation," U.S. Department of Transportation, National Highway Traffic Safety Administration (available online at <www.nhtsa.gov/people/injury/airbags/presbelt>) (hereinafter "Presidential Initiative").

[7] "Nation's Law Enforcement Declares Zero Tolerance For Unbuckled Children In All 50 States," Woman Motorist world wide web site, <www.womanmotorist.com/sfty/safety-unbuckled-01.shtml> (visited October 16, 2000).

[8] Presidential Initiative, *supra* (seat-belt use is approximately 15 percent higher in states such as Texas having "primary" seat belt use laws, defined as statutes that allow police to detain motorists solely due to nonuse of seat belts).

379.)[9] Despite this earlier warning, Ms. Atwater – in the incident now at issue – once again was observed by Officer Turek driving without her seat belt secured and without having her children properly restrained; indeed, her son was standing and had his head pressed against the windshield. (R. 380.) Ms. Atwater concedes that she was in violation of Texas law and that she was wrong to not have her children properly restrained (R. 384), and that she was not in possession of her driver's license or proof of insurance (R. 382, 704).

The laws here at issue – particularly those protecting the safety of young children by requiring restraints – are not the type of "paternalistic statutes" simply "designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large," contrary to the contention of Petitioners and the original Fifth Circuit panel. *See*, 165 F.3d 380, 385; Pet. Br. at 30. Nor is Ms. Atwater's violation "even less significant than a failure to use a turn signal." Pet. Br. at 31. She disobeyed statutes specifically designed to protect others who are helpless to protect themselves – her minor children.

The violations for which Ms. Atwater was cited also included failure to possess a valid driver's license and failure to have proof of insurance. Petitioners have argued that Officer Turek must have known that Ms. Atwater had a valid license and insurance because she

[9] The report for the instant offense, written by Officer Turek, states his recollection that the previous stop had been for "the same violation of allowing her children to ride in this truck without a seatbelt on." R. 420.

had shown them when previously detained months earlier, but do not explain why Officer Turek would know that her license and insurance had not expired between the stops. And regardless of when and on what grounds Officer Turek subjectively decided to arrest Ms. Atwater, the proper inquiry for Fourth Amendment purposes is whether the seizure was *objectively* reasonable. *See, e.g., Whren v. United States*, 517 U.S. 806, 811-816 (1996) (discussing cases). In a recent Fourth Amendment case involving a traffic citation, the Court noted that "if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Knowles v. Iowa*, 525 U.S. 113, 119 (1998). In fact, Petitioners themselves suggest that custodial arrests for fine-only traffic offenses comport with the Fourth Amendment when "necessary for the enforcement of traffic laws," Pet. Br. at 46, and give as an example a situation in which "the officer cannot ascertain the driver's identity." *Id.* at 46-47. Even under Petitioner's suggested standard, it would be objectively reasonable to detain a driver who did not possess a license.

2. The arrest and brief detention of Ms. Atwater advanced legitimate state interests.

Contrary to Petitioners' contention, the brief arrest of Ms. Atwater furthered legitimate law enforcement objectives, including the enforcement of child safety laws and encouraging suspects to appear for trial. A recent report from the Department of Transportation's National Highway Traffic Safety Administration indicates that seat belt

usage increases as states adopt more vigorous enforcement tactics.[10] If anything, Petitioner's argument that the offenses here are too inconsequential to require more than a citation and a promise to appear supports the need for vigorous enforcement, particularly in light of the statistics cited above.

Further, the City of Lago Vista had a significant interest in having collateral to secure Ms. Atwater's appearance at trial. She faced possible fines of $700 on the charges against her, plus court costs – a substantial sum of money for most people. If Ms. Atwater did not appear at trial, Lago Vista could have obtained an arrest warrant from the magistrate and sent a police officer to arrest her again; but such a procedure is time consuming, costly, and takes police officers off the street where they are needed to deal with immediate problems. When faced with nonappearance, many local governmental entities simply issue a warrant with hopes that the accused will be stopped for some other violation and the officer has some means to check for outstanding warrants via some central office or computer. A brief detention to enable a hearing before a magistrate allows a bond to be set that will substantially reduce the risk of nonappearance.[11]

Historically a central purpose of an arrest has been to ensure the suspect's presence at trial. *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* (1769) *286. If Ms. Atwater and others who commit fine-only

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[10] Presidential Initiative, *supra* note 6.

[11] The process used in this case also places the economic risk of an accused's failure to appear on the accused herself, rather than the state.

misdemeanors cannot be taken into custody, they must either be released with a promise to appear (thus increasing the risk of nonappearance and making law enforcement less effective) or pay a cash bond to an officer in the field, an unwieldy approach prone to administrative headache.

A rule that would prohibit most or all arrests for fine-only misdemeanors would also place a substantial burden upon police officers in the field to know the precise penalty ranges for myriad offenses. "[O]fficers in the field frequently 'have neither the time nor the competence to determine' the severity of the offense for which they are considering arresting a person." *Berkemer v. McCarthy*, 468 U.S. 420, 431 n.13 (1984), quoting *Welsh v. Wisconsin*, 466 U.S. 740, 761 (1984) (White, J., dissenting). These complications are avoided, and the legitimate objective of effective law enforcement is furthered, by the long-standing rule allowing arrests based on probable cause; suspects' privacy rights are at the same time protected by the constitutional rule that seizures remain reasonable in manner and duration.

3. Attempting to regulate authority to arrest based on potential punishment after conviction introduces unnecessary complication and confusion into the law enforcement process and fails to distinguish between two separate stages of the process.

Any rule of law that attempts to dictate when arrest is proper by looking to the potential range of punishment after conviction is much more complicated than Petitioners and their *amici* suggest. For example, the offenses

of public intoxication and disorderly conduct are typically Class C misdemeanors in Texas, punishable by fine only. Tex. Pen. Code §§ 42.01 (disorderly conduct), 49.02 (public intoxication); 12.23 (punishment range for Class C misdemeanors). However, if a person has been convicted three times of public intoxication and/or disorderly conduct within a two-year period, the offense may become punishable by up to 180 days in jail. Tex. Pen. Code § 12.43 (penalties for repeat and habitual misdemeanor offenders). Under the scheme envisioned by Petitioners and *amici*, an arresting officer must know the details of a suspect's criminal history in order to decide whether to arrest him (or would be compelled to release him even though the suspect could be arrested if sufficient information were available); such data is not always readily available in the field. Further, police officers are not, and should not be, the final determinors of what offenses will be charged. For instance, allowing a small child to stand unrestrained in the front seat of a moving pickup truck may constitute child endangerment under Texas law, a state jail felony, Tex. Pen. Code § 22.041(c) and (f). Allowing an officer to place a suspect under arrest and arranging for her to appear before a magistrate promptly is a time-honored and reasonable method of enforcing the law and determining appropriate security for appearance.

Arrest and punishment are two separate stages of the law enforcement process. An arrest is not part of the punishment for committing an offense; indeed it cannot be, as the suspect has not yet been convicted. The punishment that a legislature designates for an offense is a function of many factors unrelated to whether it is appropriate to arrest a suspect. Yet Petitioners' position is that

the government's constitutional authority to arrest should be based, at least in part, on whether the legislature has determined that jail time may be part of the punishment if the suspect is convicted. This argument simply misconceives the relationship between arrest and punishment.

Petitioners characterize Ms. Atwater's arrest as "particularly invasive and extreme" primarily based upon (1) the fact that the arrest took place in front of her children; (2) the nature of the seizure as a "full custodial arrest" including handcuffing, transport to the police station, and other attendant administrative functions; and (3) the alleged abusive intent of Officer Turek. *See* Pet. Br. at 28-30. One of the primary violations admittedly committed by Ms. Atwater was failure to properly restrain her children, who of course were present, so the arrest could not have been accomplished except in her children's presence; Petitioners offer no authority or reasoned argument as to why the presence of the children transforms a typical arrest into an unconstitutional act. Although the detention was a "custodial arrest," there is no evidence that she was touched at any time other than when she was handcuffed; her detention was brief, and the processing was entirely typical. And the Court has noted that the reasonableness of any seizure is judged by an objective standard; the arresting officer's intent is simply not relevant. *Whren v. United States*, 517 U.S. 806, 811-816 (1996) (discussing cases). Any custodial arrest involves some invasion of an accused's privacy interests. But the Fourth Amendment is implicated only if the invasion is unreasonable. As described above, substantial law enforcement

interests are advanced by allowing arrests based on probable cause.

An arrest for a fine-only misdemeanor comports with the Fourth Amendment when the offense was committed in the arresting officer's presence as long as the arrest is made with probable cause and is reasonable in manner and duration, without any need for further balancing. But even if the constitutional validity of every such arrest is subject to the type of case-by-case balancing that Petitioners advocate, the substantial law enforcement interests here at stake outweigh the intrusiveness of this particular, typical arrest.

C. Petitioners' suggested standard would constitutionalize a "least restrictive means" or "reasonable officer" test and would result in different meanings of the Fourth Amendment from state to state, depending upon the punishment range for misdemeanors adopted by each state's legislature.

Petitioners suggest the following standard:

> The Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for the enforcement of traffic laws or when the offense would otherwise continue and pose a danger to others on the road.

Pet. Br. at 46. This standard suggests that the Fourth Amendment, at least in the context of fine-only traffic misdemeanors, requires an officer to use either the least restrictive means of citing an offender and taking steps to ensure her appearance to answer the charges against her, or take only the action that a hypothetical "reasonable

officer" would under the circumstances. But the Fourth Amendment is not violated whenever police effect seizures that in retrospect go beyond the least restrictive means possible to deal with the situation. The constitutional protection provided by the Amendment is that seizures will not be unreasonable, a standard that allows needed latitude to the law enforcement officer in the field. Even in the context of a "*Terry* stop"[12] – based on reasonable suspicion, a lower threshold than probable cause – the Court has refused to adopt a rule requiring the police to use the least restrictive means of accomplishing their objective. "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But '[t]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, in itself, render the [seizure] unreasonable.' " *United States v. Sharpe*, 470 U.S. 675, 687 (1985) (second bracketed material added), quoting *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

Whren v. United States cautions against using a hypothetical "reasonable officer" test for determining whether police action comports with the Fourth Amendment when probable cause admittedly existed. *Whren*, 517 U.S. at 814-15. That is because probable cause – particularly when, as here, it stems from "observed violations" – affords the "quantum of individualized suspicion necessary to ensure that police discretion is effectively restrained." *Id.* at 817-18 (internal quotes omitted).

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[12] *Terry v. Ohio*, 392 U.S. 1 (1968).

Petitioners also fail to specify when, under their standard, the arrest of Ms. Atwater crossed the line into unconstitutionality. There is no indication whether they contend the Fourth Amendment was violated as soon as Officer Turek allegedly said "you're going to jail," whether the detention was acceptable until she was handcuffed, whether it was her transportation to the police station that crossed the line, or whether the brief detention at the police station was the determining factor. The standard they proffer is so vague that even they do not attempt to apply it to the facts of this case to define with any precision the limits of police activity.

Further, by attempting to define constitutional limits on police power by the punishment ranges adopted by the legislatures of individual states, Petitioners seek a rule of constitutional law that varies from state to state. The Constitution's protections should not be subject to significant change when a person crosses a political border. In rejecting the incorporation of a certain locality's standard police practices into the Fourth Amendment, the Court in *Whren* noted that police practices vary from location to location, and thus the Court "cannot accept that the search and seizure protections of the Fourth Amendment are so variable." *Whren*, 517 U.S. at 815. Once again, Petitioners and their *amici* seek what this Court has already rejected.

The "probable cause plus" standard suggested by Petitioners is not only contrary to precedent and logic, but also is not consistent with the various standards advocated by *amici*:

- Americans for Effective Law Enforcement, Inc. suggests a complex multi-factor "balancing" test for the constitutionality of arrests in cases of "minor" offenses, listing eight factors that are "non-exclusive."
- The ACLU argues that arrests for fine-only offenses are *per se* unreasonable in the absence of "exigent circumstances."
- The Institute on Criminal Justice appears to maintain that custodial arrests for *any* non-jailable misdemeanor is *per se* unreasonable absent "exceptional circumstances."
- The National Association of Criminal Defense Lawyers would bar arrests for fine-only misdemeanors absent a fear for public safety or inability to otherwise bring the offender to justice.

The differences among these proposed rules, and their vagueness, reveal the futility of trying to craft a Fourth Amendment "probable cause plus" rule in this area. Arrests for misdemeanors and fine-only offenses present a very wide variety of circumstances and are best governed by the long-established constitutional concepts of reasonableness and probable cause. The "touchstone of the Fourth Amendment is reasonableness," *Florida v. Jimeno*, 500 U.S. 248, 250 (1991), and "[i]n applying this test [the Court] ha[s] consistently eschewed bright-line rules." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). In defining the limits on police officers' power in this area, state and local governments should be permitted to pursue different approaches, allowing their officers the degree of flexibility that is appropriate to particular local conditions; those officers' decisions should not be subject to judicial

second-guessing unless they violate the constitutional command of reasonableness, as captured by the probable cause rule in all but the type of extreme circumstances not presented here.

D. Allowing brief custodial arrests for observed violations of traffic laws does not amount to a "general warrant" and will not lead to unredressable differential treatment or racial profiling.

Petitioners, and particularly their supporting *amici*, argue that a ruling in favor of Respondents will effectively grant law enforcement officers license to arrest motorists virtually at will and to engage in blatantly discriminatory practices for which victims will have no redress. *See, e.g.*, Brief of *Amicus* The American Civil Liberties Union *et al.*[13] at 6 (Texas law allowing arrests for traffic misdemeanors "is reminiscent of the general warrants the framers of the Fourth Amendment found so offensive"); Brief of *Amicus* National Association of Criminal Defense Lawyers *et al.* at 4-5 (allowing arrests for traffic violations "removes any constitutional constraint on officers performing traffic stŏps"); *id.* at 10-14 (arguing that upholding the constitutionality of Ms. Atwater's arrest would permit and perpetuate "profiling"). These arguments are unpersuasive for several reasons.

First, Petitioners and *amici* seek a constitutional protection that to date has not been recognized; Respondents merely seek a reaffirmation of the long-standing rule that

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[13] Hereinafter "ACLU Brief."

arrests based on probable cause – and, in this case, when the offense was admittedly committed in the arresting officer's view – comply with the Fourth Amendment's reasonableness requirement. This is not akin to granting a general warrant or writ of assistance, which conferred broad authority to search and seize virtually at will, often without even specifying a location. *See, e.g., Stanford v. Texas*, 379 U.S. 476, 481 (1965) (describing "those general warrants known as writs of assistance. . . . [that] had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws"); *Warden v. Hayden*, 387 U.S. 294, 315 n.1 (1967) (Douglas, J., dissenting) (describing the 1776 Virginia Declaration of Rights' definition of "general warrant," which included a license "to search all and any places in the discretion of the officers"); Pet. Br. at 9 ("General warrants gave those using them complete discretion as to whom to arrest, where to search, and for what to search."); *id.* at 10 ("Any person authorized by a writ of assistance had almost limitless powers to search."). General warrants and writs of assistance surely were seen by the Framers as one of the evils that led to the adoption of the Fourth Amendment, but allowing brief custodial arrests when an officer observes the commission of multiple misdemeanors does not come close to being a comparable practice, and does not grant "unfettered discretion" (Pet. Br. at 20-21) to police officers to arrest virtually anyone on the road.

Second, in maintaining that traffic violations are so common that their enforcement carries little if any weight as a legitimate state interest and invites discriminatory

enforcement, Petitioners and *amici* present an argument that was rejected in *Whren*, 517 U.S. at 818:

> Petitioners urge as an extraordinary factor in this case that the "multitude of applicable traffic and equipment regulations" is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are unaware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.

Third, arrests made with probable cause still must be reasonable in manner and duration under the Fourth Amendment. Upholding the constitutionality of Ms. Atwater's arrest does not remove all constitutional restraints from officers enforcing traffic laws. Pernicious and discriminatory practices such as racial profiling already are prohibited by the constitutional guarantee of equal protection. *Whren*, 517 U.S. at 813. A generalized fear does not justify the adoption of a prophylactic constitutional rule, particularly in a case where there is no suggestion of such prohibited discrimination. And, as a practical matter, state laws allowing custodial arrests for fine-only traffic offenses are common, *see, e.g.*, ACLU Brief at 21-25 (citing state statutes that allow custodial arrests for various types of misdemeanors), and the courts have not been flooded with claims of abuse or pretextual use of such arrest power. This is doubtlessly due at least in part to the states' own willingness to impose restrictions on the power of law enforcement

officers to make arrests for misdemeanor offenses, as well as the fact that arrests consume far more time and resources than issuing citations or warnings.

E. The result advocated by Petitioners is not demanded by this Court's decisions in *United States v. Watson* or *Knowles v. Iowa*.

In *United States v. Watson*, 423 U.S. 411, 418 (1976), the Court noted "the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence." Despite this language clearly approving of the Fifth Circuit's decision here, Petitioners argue that *Watson*'s analysis actually supports their position. They maintain that the Court "did not take for granted that probable cause was sufficient to justify a warrantless felony arrest," but rather "carefully reviewed common-law authorities to determine if a warrantless felony arrest was proper when the Fourth Amendment was adopted." Pet. Br. at 40. In *Watson*, the Court supported its holding that the warrantless arrest at issue was proper because it was made with probable cause with citation to voluminous authority – ranging from the "ancient" common law to modern statutes – authorizing warrantless arrests when made with probable cause. *Watson* demonstrates that arrests based on probable cause had long been considered reasonable and thus consistent with the Fourth Amendment. Nothing in its analysis suggested that the outcome of the case hinged solely on an interpretation of the common law in 1791, and the Petitioners cannot avoid the case's clear language noting the acceptance at common law of arrests for misdemeanors committed in the officer's presence.

Petitioners and *amicus* National Association of Defense Lawyers also argue that the Fifth Circuit's ruling here at issue either undermines or is contrary to *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, the Iowa legislature passed a law allowing field searches of motorists stopped for traffic violations, even when the police officer had already issued a ticket in lieu of arrest. The state's theory was that since the officer *could have* arrested the offender and conducted a search incident to the arrest, the officer had the constitutional authority to search even if no arrest actually took place. The Court disagreed, noting that Iowa's argument misconstrued the purpose of the search incident to arrest doctrine. It is the *arrest*, not the offense, that provides the authority for the search; the doctrine is based on "(1) the need to disarm the subject in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles*, 525 U.S. at 116. In a traffic stop when the officer has already determined there will be no arrest, "the threat to officer safety . . . is a good deal less than in the case of a custodial arrest." *Id.* at 117. As to the second justification, "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained." *Id.* at 118. Thus, the factors that justify a search incident to arrest simply are not present in a non-arrest situation.

Petitioners first argue that upholding the constitutionality of Ms. Atwater's arrest "nullifies any protection *Knowles* provides against full searches incident to arrest." Pet. Br. at 43. But *Knowles* in no way limits the "search incident to arrest" doctrine; it merely holds that there must actually be an arrest if there is to be a valid search

incident to an arrest. Ms. Atwater then maintains that since searches incident to arrest may take place before the actual arrest is accomplished, *see Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980), police officers who stop motorists for traffic violations will first conduct a field search (without probable cause to believe the motorist possesses contraband) and *then* decide to arrest if contraband is found during the search, arguing that they all along intended to effect an arrest for the initial traffic violation and that the search was incident to the arrest. Pet. Br. at 43-44. But officers have discretion as to timing of searches incident to arrests regardless of the outcome of this case, *Knowles* still disallows searches incident to arrest absent an actual arrest, and Petitioners seek a rule that gives additional constitutional protection to offenders who violate traffic laws while transporting contraband. The claim of *amicus* National Association of Criminal Defense Lawyers that *Knowles* "assumes that a custodial arrest for a misdemeanor traffic offense alone does not permit a custodial arrest," NADCL Brief at 6, misinterprets *Knowles*. Not only does *Knowles* simply reaffirm that an arrest is necessary for a valid search incident to arrest, but the Court observed that an arrest would be proper "if a police officer is not satisfied with the identification furnished by the driver," *Knowles*, 525 U.S. at 118 – which of course is closely analogous to the situation with Ms. Atwater, who was unable to produce a driver's license.

F. Traditional common law limitations, to the extent they are incorporated in the Fourth Amendment, do not invalidate the arrest in this case.

Petitioners and several of their *amici* rely heavily on what they describe as a common law rule that warrantless arrests for misdemeanors are improper unless the offense is committed in the presence of the arresting officers and constitutes a breach of the peace. Pet. Br. at 7-20; Brief of National Association of Criminal Defense Lawyers *et al.* at 14-19; ACLU Brief at 18-21; Brief of Americans for Effective Law Enforcement at 6. To the extent that the common law survives as a limit on the authority of modern police officers, it survives only as to the requirement that the misdemeanor be committed in the officer's presence, without the "breach of the peace" standard. But even more fundamentally, the common law rule was and always has been subject to modification by statute; and legislative action before, during, and after the time of the framing of the Constitution reflects widespread broadening of authority to arrest for misdemeanors without warrants beyond the strictures advocated by Petitioners.[14]

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[14] As the Fifth Circuit observed, Petitioners raised the common law argument for the first time in their *en banc* brief. Thus the argument is waived and need not be considered by this Court. 195 F.3d at 245 n.3.

1. Common law rules regarding the scope of proper warrantless arrests have been modified by statute since before the adoption of the Constitution and continue to be subject to such modification.

The "nightwalker" statutes serve as an example of approving arrests without warrants or the breach of the peace requirement. A treatise from early in the 19th Century describes the Statute of Winchester:[15]

> That if any stranger do pass by the watch, he shall be arrested until morning. And if no suspicion be found, he shall go quit; and if they find cause of suspicion, they shall forthwith deliver him to the sheriff, and the sheriff . . . shall keep him safely until he be acquitted in due manner.

2 William Hawkins, *A Treatise of Pleas of the Crown*, ch. 13, § 5, at 198 (1824). Bailiffs were also authorized by statute "to make inquiry of all persons being lodged in the suburbs, or in foreign places of the towns; and if they do find any that have lodged or received any strangers or suspicious persons," the bailiffs "may lawfully arrest and detain any such stranger, being found under probable circumstances of suspicion, until he shall give a good account of himself." *Id.*, § 12, at 182. Blackstone gives a similar account:

> Watchmen, either those appointed by the Statute of Winchester . . . to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to constables, may *virtue*

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[15] This statute dates to 1285. *See Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993).

> *officci* arrest all offenders, and particularly nightwalkers, and commit them to custody until morning.

4 *Blackstone's Commentaries* *289.

In the United States – dating back to the time of the framing of the Constitution – it has consistently been understood that legislatures may enlarge the common law arrest power by statute. In determining whether a warrantless search was valid, the Supreme Court in *Carroll v. United States*, 267 U.S. 132, 153 (1925), noted that statutes passed early in the history of the Republic allowed the type of warrantless search at issue in that case, thus indicating that the Framers considered that type of search to be constitutional. *See also Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (discussing *Carroll* and noting that its interpretation of the Fourth Amendment turned in large part on legislation enacted by Congress during the time of the framing, "as well as subsequent legislation from the Founding era and beyond").

This approach is consistent with the earliest Supreme Court cases that discuss common law warrantless arrest rules. In *Kurtz v. Moffitt*, 115 U.S. 487 (1885), the issue was whether local police officers had the power to arrest an alleged deserter from the army. The Court stated: "If a police officer or a private citizen has the right, without warrant or express authority, to arrest a military deserter, that right must be derived either from some rule of the law of England which has become part of our law, *or from the legislation of congress.*" *Id.* at 498 (emphasis added). After discussing the common law rule and English statutes, the Court carefully considered American statutes as well. *Id.* at 498-505. The case included no suggestion that

federal legislation enlarging the common law authority might violate the Fourth Amendment.

In the next case discussing the common law principle, the Court did not rely solely on the common law, but also examined statutory law to determine whether law enforcement authorities acted properly. In *Bad Elk v. United States*, 177 U.S. 529 (1900), a trial judge had instructed jurors that police officers acted lawfully in attempting to arrest the defendant, who was convicted of murder on an Indian reservation for killing one of the officers who was attempting to arrest him. After discussing the common law, the Court proceeded to consider whether there was a state or federal statute "giving any right to [the decedent] to arrest an individual without a warrant, on a charge of misdemeanor not committed in [his] presence." *Bad Elk*, 177 U.S. at 535. The Court ultimately held that the result was the same under the common law and the statutes: the arrest was unauthorized. But if the only law informing the meaning of the Fourth Amendment is the common law at the time of the framing, and if that law did not authorize the arrest, the Court need not have considered statutory authority. Similarly, in *Johnson v. United States*, 333 U.S. 10, 15 & n.5 (1948), the Court stated that "[s]tate law determines the validity of arrests without warrant" when Washington law authorized arrests for crimes committed in the presence of the arresting officer.

The common law was understood only to provide a limitation that, like other common law doctrines, could be altered by statute. Cases have upheld warrantless misdemeanor arrests without applying the breach of the peace requirement, and many states permit such arrests

without retaining that requirement. *See, e.g., Allen v. City of Portland*, 73 F.3d 232, 236 n.2 (9th Cir. 1995) ("A warrantless misdemeanor arrest which violates state law does not implicate the Fourth Amendment unless there is no probable cause"); *Fields v. City of South Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant [to arrest] for misdemeanors not occurring in the presence of the arresting officer"); ACLU Brief at 21-22 & n.14 (citing statutes of 22 states allowing warrantless misdemeanor arrests without a breach of the peace requirement); Brief of Americans for Effective Law Enforcement at 7 ("Relatively few states have retained the common law rule that such an arrest can be made without a warrant only where a breach of the peace has taken place in the presence of the arresting officer"). Petitioners themselves, citing a treatise from 1919, acknowledge that "[b]y the early twentieth century . . . legislation in many states permitted warrantless arrests for any misdemeanor committed in an officer's presence." Pet. Br. at 18. Not only are statutes modifying the claimed common law rule widespread and long-standing, but adoption of Petitioners' position would result in declaring at least portions of many states' laws unconstitutional. In 1974, the Fourth Circuit observed:

> The Fourth Amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974). Similarly, a leading treatise states:

> As for the common requirement of a warrant for misdemeanors not occurring in the presence [of the arresting officer], it is likewise not grounded in the Fourth Amendment. . . . [T]he presence test is not mandated by the Fourth Amendment.

3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.1(b) at 21, 23 (3d ed. 1996).

American courts have long authorized warrantless arrests for violations of regulatory ordinances and other arguably "minor" offenses. As one commentator noted:

> It is impossible to classify or enumerate the great number of such misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence. They include violations of health and food regulations; Sunday traveling or entertainments, nuisances on streets or sidewalks, or loitering, or meetings on same, cruelty to animals, vagrancy, drunkenness, disturbances in school houses, or at elections. . . .

Horace Wilgus, "Arrest Without a Warrant", 22 Mich. L. Rev. 541, 706-07 (1923-24). *See also* Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses", 62 Temple L. Rev. 221, 258-59 (1989) (acknowledging that with the advent of professional police forces, legislatures broadened arrest powers). There is not a tradition in the United States of prohibiting arrests such as that of Ms. Atwater.

2. Even if some common law limits are embodied in the Fourth Amendment, the arrest here at issue is consistent with any possible surviving common law limitations.

This Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980). *See also Wyoming v. Houghton*, 526 U.S. 295, 307 (1999) (Breyer, J., concurring) ("I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."). In determining whether the Fourth Amendment incorporates a common law principle, the Court has considered not just the historic common law practice but whether there is "a clear consensus among the States adhering to that well-settled common law rule." *Payton*, 445 U.S. at 590, citing *United States v. Watson*, 423 U.S. 411, 421-22 (1976). "In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions." *Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985). At the most, the common law principles apply when they "ha[ve] been generally adhered to by the traditions of our society." *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting).

As discussed above, the common law rule advanced by Petitioners has not been generally accepted. "As a general rule it may be said that the modern police officer has authority to arrest without a warrant for any public offense committed in his presence, and this includes city

ordinance violations." Edward Fisher, *Laws of Arrest* 130 (1967). "By far the most common statutory provision removes the breach of the peace limitation and thereby permits arrest without warrant for *any* misdemeanor committed in the arresting officer's presence." 3 LaFave, *Search and Seizure* § 5.1(b) at 13-14 (emphasis in original). "[C]ourt cases and statute[s] . . . allow arrest for *any offense* committed in the presence of the police officer. . . . This practice has never been successfully challenged and stands as the law of the land." *Higbee v. City of San Diego*, 911 F.2d 377, 379 & n.2 (9th Cir. 1990).

Professor Schroeder, in a law review article titled "Warrantless Misdemeanor Arrests and the Fourth Amendment," noted the following:

> Over the last century, . . . most American jurisdictions have expanded the power of police officers to make warrantless misdemeanor arrests. . . . Only a few American jurisdictions still substantially follow the common law rule limiting warrantless misdemeanor arrests to breaches of the peace committed in the arresting officer's presence, and even these permit some minor exceptions. . . . Many jurisdictions authorize warrantless misdemeanor arrests if there is probable cause to believe that a misdemeanor was committed in the arresting officer's presence. Most of these jurisdictions also permit warrantless arrests on probable cause for misdemeanors not committed in the officer's presence if there is probable cause to believe that specified circumstances exist and/or if the arrest is for a specified misdemeanor.

William A. Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo. L. Rev. 771, 774-78 (1993) (footnotes omitted).

In keeping with the American rejection of the breach of the peace element, the Court's descriptions of the common law rule often simply have omitted that requirement. *See, e.g., Watson*, 423 U.S. at 418 ("the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence"); *Carroll v. United States*, 267 U.S. 132, 156-57 (1925) ("The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."); *Bad Elk v. United States*, 177 U.S. at 534 ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz v. Moffitt*, 115 U.S. at 498-99 ("By the common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony").

Even if the common law rule governing misdemeanor arrests is understood as a constitutional limitation, the part of the common law principle that has taken root in American law permits – at the very least – warrantless misdemeanor arrests, on probable cause, for any offense committed in the officer's presence. Because Ms. Atwater's offenses were committed in the presence of

Officer Turek, her arrest was consistent with the Fourth Amendment.[16]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[16] Petitioners do not argue to the Court that their interpretation of the Fourth Amendment is clearly established law, and thus Officer Turek and Chief Miller at a minimum are entitled to qualified immunity as to the individual capacity claims against them.

(19)

Supreme Court, U.S.
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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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ARGUMENT IN REPLY

The custodial arrest of Gail Atwater was unreasonable.[1] Petitioners have demonstrated why the arrest was constitutionally unreasonable and violated the Fourth Amendment: first, the arrest would have been unlawful when the Fourth Amendment was adopted; and second, the nature and degree of the intrusion that accompanied the custodial arrest far outweighed any governmental interest in enforcement furthered by the arrest.

Respondents and their *amici*, in turn, raise two primary arguments to defend the decision of the court below. First, they dispute the meaning of the term "breach of the peace," then contend that regardless of its meaning, legislatures may freely reduce the protections against arrest that existed when the Fourth Amendment was adopted. Second, they urge that probable cause alone determines the reasonableness of all custodial arrests, and the nature of the offense for which the arrest was made should be ignored.

These arguments fail to demonstrate the arrest here was any more reasonable in a constitutional sense than it was from a common-sense perspective. The authorities respondents and their *amici* cite fail to indicate such an arrest would have been lawful when the Fourth Amendment was adopted, and no decision of this Court indicates that framing-era protections can or should be abandoned. Respondents and their *amici* likewise fail to demonstrate probable cause is an adequate substitute in this case for the Fourth Amendment's reasonableness standard. Finally, they offer no convincing support that the custodial arrest of Ms. Atwater remotely furthered any legitimate law enforcement interest sufficient to justify the intrusion.

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[1] Even some of respondents' *amici* essentially concede that Officer Turek should not have arrested Ms. Atwater. *See* U.S. Br. at 7; Texas Br. at 10.

I. The Framing Era's Protections Against Arrest Should Not be Forgotten or Ignored

Respondents and their *amici* contend the term "breach of the peace" encompassed all crimes, then assert that framing-era restrictions on custodial arrest are just not important. The argument that "breach of the peace" had so broad a definition as to render the common law rule a non-rule is not persuasive. Further, this Court has never indicated the Fourth Amendment protects Americans today less fully than their framing-era forebearers. Constitutional protections do not erode with time.

A. An Arrest Like the One at Issue Here Would Not Have Been Permitted When the Fourth Amendment Was Adopted

Respondents and their *amici* do not expressly argue that an arrest of the sort that occurred here could have been made when the Fourth Amendment was adopted. However, several of respondents' *amici* dispute the meaning of "breach of the peace." They argue that "breach of the peace" sometimes meant all violations of the criminal law, and thus the restriction on warrantless arrests should be re-written as "no warrantless arrests except for crimes."

This argument fails for several reasons. First, it ignores the general rule at common law that an arrest could not be made without a warrant. *See* 2 *Works of James Wilson* 684 (Robert G. McCloskey ed. 1967) ("A warrant is the first step usually taken for the[] apprehension [of criminals]."); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 641 & n. 256 (1999) (and authorities cited therein). Felonies and ongoing breaches of the peace were an *exception* to this general rule. *See* 2 *Wilson*, *supra*, at 685.

Furthermore, founding-era commentators' writings reflect an understanding that breach of the peace did not encompass all non-felony criminal offenses. *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England*, 160-61, 248 (1769); Petr. Br. at 14-15.

Neither respondents nor their *amici* cite framing-era sources that indicate a broader, lesser-known definition of "breach of the peace" was intended when used to describe arrest authority. The authorities they rely upon are a concurring opinion in a case addressing the First rather than the Fourth Amendment,[2] a decision construing the Speech and Debate Clause,[3] and various twentieth-century sources.[4] Neither of the decisions of this Court indicate that "breach of the peace," when used to describe common-law arrest powers, meant any violation of the criminal law.

For example, *amici* Texas and the National League of Cities cite Justice Scalia's discussion of "'peace' and 'order'" in colonial provisions regarding religious observances, *City of Boerne v. Flores*, 521 U.S. 507, 539-40 (1997) (Scalia, J., concurring), as if it were pertinent here. Regardless of any meaning attached to "peace" in that context, the common law authorities on arrest defined breach of the peace far more specifically. *See* Petr. Br. at 13-17. The short 1704 English decision cited by Justice Scalia, 521 U.S. at 539, does not concern the law of arrest. *Queen v. Lane*, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B. 1704), addressed only the technical pleading requirement that an indictment contain the magic words "contra pacem." *Id.*; *see* Petr. Br. at 17 n.8.

Likewise, reliance on decisions construing the Speech

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[2] *City of Boerne v. Flores*, 521 U.S. 507, 538-40 (1997) (Scalia, J., concurring), *cited in* Texas Br. at 17, U.S. Br. at 14 n.12, Nat. League of Cities Br. at 13 n.7.

[3] *United States v. Brewster*, 408 U.S. 501, 521 (1972), *cited in* Texas Br. at 17, U.S. Br. at 14.

[4] *See* Texas Br. at 17; U.S. Br. at 13-14.

and Debate Clause is equally misplaced. First and foremost, that Clause is a wholly unrelated constitutional provision. It shares none of the well-recognized history that led to the adoption of the Fourth Amendment and its accompanying Bill of Rights provisions. *See* Petr. Br. at 8-12.

Moreover, the treatment of "breach of the peace" in the Speech and Debate Clause as applying to "all crimes" involves an historical error. *See Williamson v. United States*, 207 U.S. 425, 439 (1908); *United States v. Brewster*, 408 U.S. 501, 521 (1972). The discussion in *Williamson* was anchored on a quotation attributed to "Blackstone, in 1765," citing "Lewis's ed., *165." That "star" page cite, however, is actually to a later edition, not to the 1765 first edition. In the first edition, Blackstone wrote that arrest of members of parliament was limited to "crimes *of such public malignity* as treason, felony, or breach of the peace; or rather perhaps in such crimes for which surety of the peace may be required," indicating the existence of other crimes that were *not* of such public malignity. 1 William Blackstone, *Commentaries on the Laws of England* 160-61 (1st ed. 1765) (emphasis added). Blackstone also commented that sureties of the peace could be required in cases of "gross misdemeanors." 4 William Blackstone, *Commentaries on the Laws of England* 248 (1st ed. 1769).

Blackstone's initial view – that minor offenses did *not* constitute arrestable breaches of the peace – was the same as that of Chief Justice Pratt, who released John Wilkes on writ of *habeas corpus* in 1763 following his arrest for seditious libel. *See* Petr. Br. 9-10. Pratt released Wilkes after determining that seditious libel was *not* a breach-of-the-peace offense, which meant his arrest had been unlawful because the offense was covered by the privilege held by members of parliament. *Ex Parte Wilkes*, 2 Wils. 150, 19 How. St. Tr. 981, 95 Eng. Rep. (C.P. 1763). Lord Mansfield then sponsored legislation to narrow the privilege, in response to Pratt's freeing of Wilkes.

See Williamson, 207 U.S. at 438-39. Blackstone subsequently amended his discussion of parliamentary privilege to accord with the new statute, and *Williamson* quoted the later revision. But it was Blackstone's original statement, and Pratt's ruling in the *Wilkes* case – part of the very litigation that led to the Fourth Amendment's adoption – that show the common law meaning of "breach of the peace" as understood by the Framers.

B. This Court Has Never Indicated the Limitations on Search and Seizure that Existed When the Fourth Amendment Was Adopted Can Be Legislatively Diluted

In an effort to downplay the significance of framing-era restrictions on arrest, respondents and their *amici* contend there has been a "widespread broadening of authority to arrest," Resp. Br. at 30, and "that a state, by statute, may authorize arrests that would not have been permissible at common law." Texas Br. at 18-19. On the contrary, the framing-era protections against search and seizure are the baseline of Fourth Amendment protections.

1. The Fourth Amendment at times provides greater protection, but never less protection, than when the Amendment was adopted

Respondents correctly note that this Court has stated that "law enforcement practices that existed at the time of the Fourth Amendment's passage" are "not simply frozen into constitutional law." *E.g.*, Resp. Br. at 36. However, the Court has used this statement only in decisions that expanded the Fourth Amendment's protections beyond what existed when the Amendment was adopted. *See, e.g., Payton v. New York*,

445 U.S. 573, 591 n.33 (1980); *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981); *Tennessee v. Garner*, 471 U.S. 1, 13 (1985). Petitioners are unaware of any instance in which this Court has *weakened* the protections provided by the framing-era common law.

The characterization of *Warden v. Hayden*, 387 U.S. 294 (1967) (*cited in* Resp. Br. at 25; Texas Br. at 16; U.S. Br. at 13), as a case that reduced common law protections, is inaccurate. In *Hayden*, this Court repudiated the "mere evidence rule." *See Hayden*, 387 U.S. at 300-01. *Hayden*, however, was not a reduction of common law protections, but part of a larger shift in the Court's Fourth Amendment jurisprudence that expanded protections by rejecting property and ownership rights as their only bases. *See id.* at 303-07.[5]

As the Court has often explained, the first question in determining whether a particular governmental action violates the Fourth Amendment is whether the action would have been unlawful when the Fourth Amendment was adopted. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). Consistent with such an inquiry, the Court has not indicated that the protections of the Fourth Amendment can be *less* than those that existed when the Amendment was framed.

2. This Court has not approved the legislative dilution of framing-era restrictions on arrest authority

Respondents' broad assertion that the common law may be altered by statute likewise misses the point. Instead, the important inquiry is what legal protections existed at the time

[5] Recent scholarship also indicates that the "mere evidence" rule never was a part of the common law, finding its genesis instead in this Court's decision in *Boyd v. United States*, 116 U.S. 616 (1886). *See* Davies, *supra*, at 726-27, nn. 512, 513.

the Fourth Amendment was adopted. This question helps to determine the meaning of the word "unreasonable," an issue respondents and their *amici* avoid addressing.

Furthermore, Respondents and their *amici* provide no evidence that the framers anticipated that familiar common law restrictions on arrest authority could be lifted by legislation. The only framing-era authorities they cite are those discussing the power of night watchmen to arrest "nightwalkers," derived from the 1285 Statute of Winchester.[6] This "statute," however, was not legislation in the modern sense, but a royal declaration that predated any notion of distinguishing among the executive, legislative, and judicial branches of English government. Indeed, because the statute was so ancient, it was not even distinguished from the rest of the common law. Beyond this, respondents and their *amici* cite no framing-era authorities. In fact, early federal legislation seemed to defer to common law rules of arrest.[7]

The post-framing-era authorities provide no persuasive authority for the understanding when the Fourth Amendment was adopted. For example, the twentieth-century English treatise cited by the Solicitor General cites examples of nineteenth-century English statutes. U.S. Br. at 8-9. This hardly provides any insight into the understanding of the framers of the Fourth Amendment.

Respondents likewise find no support in this Court's decisions to indicate that framing-era restrictions could be abandoned under the Fourth Amendment. Beyond dissenting opinions from individual Justices, respondents and their *amici*

[6] U.S. Br. at 9; Resp. Br. at 31-32. Arguably, the Statute of Winchester just reflected the reasonable notion that, in an age before lighting, finding a person walking about in the dead of night equaled probable suspicion that the person was a felon.

[7] *See, e.g.*, Act of May 2, 1792, ch. 18, § 9, 1 Stat. 265.

only cite cases in which the Court simply did not *mention* the breach of the peace requirement, urging that this silence indicates disapproval of the requirement. *See*, *e.g.*, Resp. Br. at 32-33; Texas Br. at 18. There is a much better explanation for this silence: the rule was not implicated by the decisions.[8]

Petitioners provided extensive authority to demonstrate that Ms. Atwater's arrest would not have been permitted when the Fourth Amendment was framed. *See* Petr. Br. at 7-22. Respondents and their *amici* have offered no persuasive authority to refute this or to indicate that the framers understood that their hard-won protections against search and seizure could be dispensed with by future legislatures.

II. Probable Cause Does Not Insure the Reasonableness of a Custodial Arrest for a Minor Traffic Offense Because It Fails to Balance the Competing Interests of the Individual and Law Enforcement

Respondents broadly assert that "neither more nor less" than probable cause "is required to justify a seizure," Resp. Br. at 11, and even proclaim that probable cause, not reasonableness, is the "touchstone" of Fourth Amendment analysis. Resp. Br. at 4. As the court below did, respondents and their *amici* elevate probable cause so as to render the Fourth Amendment's reasonableness requirement a nullity.

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[8] The arrest held unlawful in *Bad Elk v. United States*, 177 U.S. 529 (1900), involved an offense not committed in the officer's presence. *Kurtz v. Moffitt*, 115 U.S. 487 (1885), dealt with the issue of whether civilian authorities could arrest for desertion from the military, a point the common law did not address. *Carroll v. United States*, 267 U.S. 132, 157 (1925), cited the breach-of-the-peace requirement, and because the common-law rule precluded an arrest, the Court in *Carroll* described the arrest as only an "incidental" arrest after the discovery of a large quantity of illegal liquor.

This Court's jurisprudence supports no such construction. Although in some circumstances, establishing probable cause that an offense has been committed also establishes Fourth Amendment reasonableness, that is not always the case. Because probable cause fails to consider either the nature of the intrusion on the individual or the governmental interests at stake, probable cause alone is insufficient to test the reasonableness of the custodial arrest here.

A. Probable Cause Has Not Replaced Reasonableness as the Touchstone of Fourth Amendment Analysis for Seizures of the Person

This Court has never held that probable cause alone makes a custodial arrest for *any* offense reasonable under the Fourth Amendment. Such a rule ignores the text of the Amendment itself, as well as the Court's decisions in which seizures of the person were at issue.

1. A probable cause requirement for custodial arrests is no requirement at all for most minor traffic offenses

By relying solely on probable cause to justify the arrest of Ms. Atwater, respondents and their *amici* ignore the obvious: probable cause in the traffic offense context imposes no limitation on arrest authority if the officer witnesses the offense. Probable cause imposes no restriction because, by its terms, it presupposes uncertainty regarding the commission of the offense or the location of the object of a search warrant. For example, in *Brinegar v. United States*, 338 U.S. 160 (1949), probable cause imposed a restriction on the stop and search by requiring the Alcohol Tax Unit investigator to identify specific facts and circumstances within his knowledge

that gave rise to his belief that the vehicle's driver was smuggling alcohol. *Id.* at 162-63. In contrast, when a police officer observes a minor traffic offense, there is no uncertainty. The officer witnessed the actual offense.

Respondents and their *amici* therefore actually ask the Court to recognize a rule that permits a custodial arrest for *any offense*, regardless of its nature, committed in an officer's presence. What respondents refer to alternatively as an "objective standard" and a "familiar standard," Resp. Br. at 4, 7, is, in fact, no standard at all for the simple traffic offense.[9] In short, determining whether probable cause exists weighs none of the competing interests at stake; it does nothing to determine whether any legitimate law enforcement interest justifies the extreme intrusion on the individual's liberty interests that results from a custodial arrest.

2. The text of the Fourth Amendment and this Court's decisions show that probable cause does not always equate to reasonableness

Relying solely on probable cause to determine the constitutionality of all arrests also ignores the text of the Fourth Amendment, which places reasonableness above probable cause. First and foremost, the Amendment prohibits *all*

[9] Drunk driving would be an exception. The requirement of probable cause does, in that context, impose an actual limitation, *e.g.*, red eyes, slurred speech, and other possible evidence creating a suspicion of intoxication. But petitioners have never contended that it is unreasonable to arrest based on probable cause for driving while intoxicated, or any other offense that can only be halted by removing the driver from the road. *See* Petr. Br. at 46. Moreover, driving while intoxicated has been widely recognized as an offense that amounts to a breach of the peace.

unreasonable searches and seizures. The Amendment then lists probable cause as one requirement for warrants. Indeed, probable cause was only one part of the common law requirement necessary to support an arrest warrant. *See* Davies, *supra*, at 651-52, 703-06.

This Court's decisions likewise have not indicated that probable cause ends the inquiry of whether a seizure of the person is reasonable. If it did, the thorough discussion in *United States v. Watson*, 423 U.S.411, 414-24 (1976), to determine the reasonableness of a warrantless felony arrest based on probable cause would have been unnecessary.

Texas repeatedly cites *Henry v. United States*, 361 U.S. 98 (1959), to support its contention that probable cause always equates to reasonableness. Texas Br. at 4, 6, 9, 20, 22. But comparing *Henry* with this Court's later decision in *Terry v. Ohio*, 392 U.S. 1 (1968), demonstrates that the constitutional reasonableness of seizures of the person does not always hinge on probable cause.

In *Henry*, this Court invalidated a seizure of the person when probable cause was lacking. The seizure was not a custodial arrest, but an investigative stop of a motor vehicle when the suspicions of federal agents investigating a theft were aroused. The government conceded that an "arrest took place when the federal agents stopped the car." *Henry*, 361 U.S. at 103. "When the officers interrupted the two men and restricted their liberty of movement, the arrest . . . was complete." *Id.* The Court held that the federal agents' suspicions of criminal activity were not sufficient to justify the stop. *Id.* at 104.

Just eight years later, this Court approved a similar seizure of the person. *See Terry v. Ohio*, 392 U.S. 1 (1968). Probable cause again was lacking, and there were "suspicious circumstances" as there had been in *Henry*. *See* 392 U.S. at 5-8. Nevertheless, the Court held it was reasonable for the officer to seize the defendant and pat his person for weapons, based on a reasonable fear that he was armed. *Id.* at 28. This Court has

subsequently approved investigative traffic stops in other settings where probable cause also was lacking. *See, e.g., United States v. Hensley*, 469 U.S. 221, 227 (1985).

This Court also has indicated that sometimes *more* than probable cause that a minor traffic offense has been committed is required to justify a particular seizure of the person. In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court held that a 20-minute roadside detention did not exceed the bounds of *Terry*. *Sharpe*, 470 U.S. at 687-88. The *Sharpe* defendants were driving 55 to 60 miles per hour in a 35 mile-per-hour zone. *Id.* at 677. If probable cause that a traffic violation had been committed were sufficient to justify a custodial arrest, as respondents and their *amici* contend, questioning the *length* of the less intrusive investigative stop would have been pointless. The officers could simply have made a more intrusive custodial arrest for the traffic violation, without developing probable cause for the drug search.

Similarly, the police officer stopped the defendant after observing him driving the wrong way on a one-way street in front of the police station in *Arizona v. Evans*, 514 U.S. 1, 4 (1995). If the officer could have permissibly placed the defendant under custodial arrest for this traffic violation that was committed in his presence, whether the computer correctly indicated there was an outstanding arrest warrant would not have mattered, and there would have been no argument that the exclusionary rule should apply. *See Evans*, 514 U.S. at 10-16.[10]

At times, seizures of the person are permitted on less than probable cause. At other times, more than probable cause has been necessary, as in the context of seizures that begin with

[10] Although *Sharpe* and *Evans* did not address the precise issue in this case, these and similar decisions place in perspective instances identified by Texas where the Court has referred to statutes permitting arrests for traffic violations "without criticism." Texas Br. at 13.

a traffic stop. The common thread throughout these cases has been the Fourth Amendment's express command of reasonableness, and a recognition that all seizures of the person are not alike and have varying degrees of intrusiveness.

The failure to distinguish between different degrees of seizures of the person causes respondents to mistakenly rely on *Whren v. United States*, 517 U.S. 806 (1996). For the *Whren* holding – nothing more than probable cause is needed to justify making a traffic stop – to govern this case, a traffic stop must be indistinguishable from a custodial arrest. At least since *Terry*, however, this Court has treated traffic stops differently from custodial arrests. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). Because this case involves a custodial arrest and not a traffic stop, *Whren* does not govern, and the Fifth Circuit majority erred in relying on it.

B. No Legitimate Law Enforcement Interest Was Furthered by the Custodial Arrest in this Case

Because probable cause is an inadequate substitute for reasonableness, the competing interests of the individual citizen and law enforcement must be balanced to determine whether the custodial arrest here was reasonable. Respondents and their *amici* contend that petitioners have not presented the Court with an accurate depiction of the competing interests by minimizing the governmental interest and exaggerating the intrusion. Respondents and their *amici* err, however, by equating arrest with enforcement, by disregarding a crime's penalty as relevant to the scope of arrest authority, and by minimizing the risk, trauma, and intrusion that accompany every custodial arrest.

1. A governmental interest in enforcement of the law does not equal a legitimate governmental interest in making an arrest

Respondents and their *amici* fiercely argue the appropriateness of enforcing seat belt laws, *see*, *e.g.*, Resp. Br. at 12-15, but petitioners do not dispute this point. Enforcement is legitimate and appropriate for all criminal offenses, including seat belt laws. But a custodial arrest is appropriate only if it is "reasonable" after balancing the suspect's interest in being free from such an intrusion and the government's legitimate law enforcement interest (if any) in making the arrest. The government's interest must be evaluated by determining the extent to which the arrest furthers the government's admittedly legitimate interest in enforcing the law *and* by determining the strength of the government's interest in enforcing the law.

Respondents and their *amici* argue that custodial arrests for minor traffic offenses may aid enforcement when drivers are unable to establish their identities. Petitioners accept that in an appropriate case the driver's inability to establish identity may provide a legitimate governmental interest to be considered in the balancing process. The rules proposed by petitioners and *amici*, accordingly, would permit consideration of this factor. But here, identity is not an issue. Respondents concede that "Officer Turek recognized [Ms. Atwater] since he had stopped her 'several months before.'" Resp. Br. at 1. Furthermore, she provided him with her driver's license number, and he was able to confirm she was still a licensed driver. R. 386. The arrest, therefore, cannot be justified by any concerns about her identity or entitlement to drive.

Respondents and their *amici* also seek to justify the arrest here by suggesting that custodial arrests can deter the commission of crime. *See*, *e.g.*, Resp. Br. at 13 & n.8; U.S. Br. at 23. To the extent that assertion is true, it treats arrest as a

form of punishment.[11] However, police officers may not inflict punishment, which is appropriate only after conviction. Thus, the degree to which custodial arrests act as a deterrent is not a legitimate governmental interest that can justify this arrest.

Respondents also challenge petitioners' arguments that quantify the state's interest in enforcing the seat belt law based on its minimal penalty. They argue that the severity of the punishment bears no relation to the means that may be used to enforce the crime. *See* Resp. Br. at 17-18. This Court has stated otherwise. The less serious the violation, the less the intrusion tolerated by the Fourth Amendment. *See Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984); *see also Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

Moreover, the nature and penalty of a criminal offense have always been a consideration in determining the scope of arrest authority. *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 567 (1924) (explaining that the rules of arrest are in part "based upon the nature of the offense"). Common law rules of arrest were based on the reasonable notion that the lighter the punishment, the less likely an accused person would flee, making arrest unnecessary. *See* Edward C. Fisher, *Laws of Arrest* 189 (1967).

Respondents seek to raise the spectre of the dangers of children not using seat belts, but the Texas Legislature provided no greater penalty for unbelted children than for unbelted adults. Both offenses are class C misdemeanors, and the maximum penalty ($50) is less than the typical maximum fine provided for other class C misdemeanors ($500). *Compare* Tex. Transp. Code Ann. § 545.413 *with* Tex. Penal Code Ann. § 12.23. Under this Court's decisions and common law rules

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[11] Petitioners accept the respondents' implicit suggestion that Officer Turek's actions were likely an effort to punish Ms. Atwater. *See also Atwater v. City of Lago Vista*, 195 F.3d 242, 250 (5th Cir. 1999) (en banc) (Wiener, J., dissenting), Pet. App. at 18a.

of arrest, this minor penalty has great significance to the permissible seizures permitted to enforce this crime.

Finally, respondents contend possible enhanced penalties for repeat offenders would make it impossible for an officer who lacks access to a suspect's criminal history to know when a custodial arrest is justified. This argument fails on several grounds. Most fundamentally, respondents again confuse the roles of arrest and punishment. The issue is not whether an officer is entitled to inflict a custodial arrest on a driver who is a repeat offender; the issue remains whether the government has a legitimate law enforcement interest in making an arrest that outweighs the driver's interest in avoiding the intrusion. The government must still show that the arrest furthers the law enforcement function. The fact that a particular offender may be punished more severely by a judge based on a prior record would not change the presumed importance of enforcing the law.

Furthermore, respondents offer no examples, other than drunk driving (which petitioners admit should be treated differently), in which repeat traffic violations dramatically increase the penalties for individual offenses. Thus, even if respondents' objections were valid in the abstract, they do not raise a practical problem that is significant enough to influence this Court when addressing the constitutional problem at issue. In any event, the objections raise no problem here, for Ms. Atwater was not a repeat offender.[12] When Officer Turek stopped her the first time, she and the children were belted in compliance with the law. *See* Petr. Br. at 4.

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[12] Furthermore, Texas law does not provide any enhanced penalty for repeated violations of the seat belt law.

2. Respondents' efforts to minimize the intrusion of Ms. Atwater's custodial arrest fail to make the arrest any more "reasonable"

Respondents claim that "[n]othing unusually harmful to Ms. Atwater is involved here." Resp. Br. at 4-5. Officer Turek "touched" Ms. Atwater for the first time when he handcuffed her, then he "helped her into the back of his patrol car." Resp. Br. at 2. They assert that her vehicle was not "searched," *id.*, presumably because they do not consider the inventory search of her vehicle to be a "search." None of these points make the arrest here any more reasonable or less of an intrusion on Ms. Atwater's liberty interests. Moreover, the fact that Ms. Atwater did not experience some of the more horrible and potentially life-threatening risks that often accompany custodial arrests was merely fortuitous.

The light touch utilized when handcuffing Ms. Atwater does not change its intrusive nature. The arrest occurred in public, in view of a crowd of her neighbors, and in front of her children. *See* Petr. Br. at 3-4. Ms. Atwater also experienced all the usual accouterments of a custodial arrest: handcuffing, transportation to the police station, the booking process, and being placed in a jail cell. *See* Petr. Br. at 4-5. That the arrest was "brief" does not change the fact that for the duration of the arrest, Ms. Atwater's liberty and privacy interests were completely forfeited.[13]

---

[13] Respondents might likewise regard the detention of the journeyman printer in the landmark case of *Huckle v. Money* as having been "brief" and not "unusually harmful": the printer was only detained for six hours, and the king's messengers treated Huckle to beefsteaks and beer. *Huckle v. Money*, 2 Wils. K.B. 205, 207, 95 Eng. Rep. 768, 769 (K.B. 1763). Good food and brevity, however, made the arrest no less unlawful. *Id.*

Indeed, if the Lago Vista lockup had been full, Ms. Atwater would have been taken to the Travis County Central Booking Facility, where she would have experienced a far more intrusive and frightening set of booking procedures, and might have spent the night in jail. The Institute on Criminal Justice brief explained how the booking process in most metropolitan jails is especially traumatic for first-time detainees: holding cells with up to 40 potentially violent offenders; possible exposure to infectious diseases such as AIDS and tuberculosis; and increased risks of assault, illness, and even suicide. *See* Inst. Crim. Justice Br. at 6-9.

Finally, arguments that focus on Ms. Atwater's experience after her arrest obscure the real issue: the reasonableness of the arrest itself. This should not depend on the size of the jurisdiction or the procedures used in the jail,[14] but on the officer's decision to place an individual under custodial arrest.

3. Prohibiting custodial arrests for seat belt violations would not handicap legitimate law enforcement interests

Respondents contend that placing any limits on the use of custodial arrests, even for minor traffic offenses, would intolerably handicap legitimate law enforcement, and their actions should not be "second-guess[ed]." *See* Resp. Br. at 23-24. This contention is inaccurate, however, because the good law enforcement practice is to rarely use such arrests. Even the Solicitor General concedes that "it generally is inappropriate to enforce [a seat belt] law other than by way of citation." U.S. Br. at 28. He also reports that the federal agency dedicated to seat

[14] Under respondents' analysis, routine jail procedures, which are generally administered by officials who do not yet know the offense charged, would be constitutionally acceptable for one set of arrestees but not for another.

belt law enforcement considers "arrests for seatbelt violations to be counterproductive to the national goal of increasing seatbelt compliance." *Id.* at 28 n.27. Arresting an individual for any minor offense typically serves no useful purpose, and instead creates more serious problems for law enforcement interests. *See* Inst. Crim. Justice Br. at 11-17.

Of course, exceptional cases may arise in which an arrest for a minor offense will serve some legitimate law enforcement purpose. The possible rule that petitioners propose, *see* Petr. Br. at 45-46, and the possible rules that have been proposed in *amicus* briefs by prominent national organizations, *see, e.g.*, Inst. Crim. Justice Br. at 21-27, all recognize and effectively provide for these exceptional cases. Respondents argue that the model codes demonstrate a need for exceptions to the general practice of issuing citations for traffic offenses. But the need for officer discretion in certain exceptional circumstances does not demand complete, unfettered discretion in *every* circumstance.[15]

Finally, a limiting rule with appropriate exceptions is workable in practice. Some states already apply rules much like those advocated by petitioners and supporting *amici*. *See* Inst. Crim. Justice Br. at 28-29. Many law enforcement agencies (including the Texas Department of Public Safety) already apply such rules as a matter of internal policy. *See id.* at 29-30, Texas Br. at 10-11.

In sum, this Court can safely deal with the Fourth Amendment violation that occurred here without fear of

[15] In any event, respondents' argument goes only to the scope of any rule that might be announced in this case. It does not show why the arrest *in this case*, where none of the cited exceptions apply, was reasonable. "[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances *of each case*." *Cooper v. California*, 386 U.S. 58, 59 (1967) (emphasis added).

handicapping legitimate law enforcement interests. Good police officers already issue citations in lieu of arrest for fine-only traffic offenses, and good law enforcement practice recognizes that arrests for minor offenses are counter-productive. Any rule the Court might adopt could provide appropriate exceptions to deal with exceptional cases. But no exceptional circumstances existed here. The only thing exceptional about this case was Officer Turek's unjustifiable decision to arrest Ms. Atwater.

III. Conclusion.

Respondents have never, at any level of this appeal, even attempted to explain how *this* custodial arrest, the handcuffing and custodial arrest of Gail Atwater, furthered any legitimate law enforcement objective that could not also have been completely accomplished by issuing her a citation. Put another way, no one has ever sought to explain why Officer Turek's use of a custodial arrest under these facts was reasonable.[16] The explanation is simple: the arrest was not reasonable, either in a constitutional sense or in every-day parlance. The judgment of the Fifth Circuit should be reversed.

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[16] Respondents and some *amici* raise Officer Turek's qualified immunity defense. Resp. Br. at 39 n.16; Texas Br. at 22 n.8. The issue is not before the Court. The Fifth Circuit held only that there was no constitutional violation, and refrained from reaching the remainder of the qualified immunity analysis. *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 n.5 (5th Cir. 1999), Pet. App. A. at 7a. Qualified immunity requires first determining the constitutional issue. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

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In the Supreme Court of the United States

GAIL ATWATER, ET AL., PETITIONERS

v.

CITY OF LAGO VISTA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the reasonableness clause of the Fourth Amendment prohibits officers, who have probable cause to believe that a crime has been committed, from arresting the suspect because the crime involves a traffic offense that is punishable only by a fine.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question under the Fourth Amendment's reasonableness clause whether police officers may make warrantless arrests for misdemeanor offenses that are punishable only by a fine or whether the arrest authority is limited to misdemeanors that are punishable by imprisonment or that cause a breach of the peace. There are approximately 85 federal criminal offenses that are punishable only by a fine. See App. A, *infra*. Federal law enforcement officers are authorized by statute to make warrantless arrests for any misdemeanors committed in their presence, without any limitation to violations punishable by more than a fine or to those that constitute a breach of the peace. See, *e.g.*, 16 U.S.C. 460*l*-6a(e) (authorizing arrest without a warrant for fine-only offenses committed in national parks or federally administered recreation sites or facilities); 18 U.S.C. 3052, 3053. In addition, the United States frequently prosecutes cases based on evidence that comes to light as the result of arrests by state or local authorities enforcing their own laws under their own policies. The United States

therefore has a significant interest in the resolution of this case.

STATEMENT

1. Texas has made it a criminal offense for front-seat passengers in a passenger vehicle to fail to wear safety belts if the vehicle is equipped with such belts. Tex. Transp. Code Ann. § 545.413(a) (West 1999 & Supp. 2000). Texas law also criminalizes the failure of a driver to secure with a safety belt any child between the ages of 4 and 15 who is riding in the front seat of the vehicle. *Id.* § 545.413(b). Violation of the law is punishable by a fine of not less than $25 or more than $50.[1] Texas law authorizes, but does not require, law enforcement officers to issue citations in lieu of arrest for violations of the seatbelt law. *Id.* §§ 543.003-543.005.

2. In March 1997, petitioner Gail Atwater was driving with her two children in the family's pickup truck. Pet. App. 51a. Petitioner's three-year-old son and five-year-old daughter accompanied her in the front seat. *Ibid.*; J.A. 20.[2] Petitioner was not wearing a seatbelt, nor had she put seatbelts on her children. Respondent Bart Turek, at that time a City of Lago Vista police officer, witnessed the seatbelt violations and stopped petitioner's vehicle. According to the allegations of the complaint, which must be accepted as true at this stage, respondent Turek yelled at petitioner as he approached the vehicle that "[w]e've met before" and

[1] Federal law similarly criminalizes the failure of an operator and all passengers to wear safety belts in any passenger car operated on federal parkways or federal parkland. 36 C.F.R. 4.15. Failure to comply is punishable by a fine of up to $5000 or six months' imprisonment or both. 36 C.F.R. 1.3(a); 18 U.S.C. 3571(b)(7).

[2] Although the district court described the children as "seated," petitioner Atwater's affidavit indicates that both children were standing on their seats, C.A. App. 702, and the complaint is not inconsistent with the affidavit. J.A. 20. The police report indicates that petitioner's son was "standing in the passenger side of the truck and leaning against the dashboard." C.A. App. 420.

"[y]ou're going to jail." Pet. App. 51a-52a; J.A. 20.[3] Respondent then called for back-up and asked petitioner for her license and insurance information. Pet. App. 52a. Petitioner responded that she did not have them because her purse had been stolen the day before. Respondent stated that he had "heard that story two-hundred times" from stopped motorists. J.A. 21; see also Pet. App. 52a. When petitioner asked to take her children to a friend's house nearby, respondent replied, "[y]ou're not going anywhere." Pet. App. 52a; J.A. 21. Petitioner's friend then arrived and took the children to her home. *Ibid.* After the children left, respondent Turek handcuffed Atwater and took her to the local jail, where she spent approximately one hour being processed and having bail set. Pet. App. 2a, 52a; C.A. App. 423. In addition, petitioner's car was impounded. Pet. App. 52a. The arrest report charged petitioner with driving without a seatbelt, failing to restrain her children in seatbelts, driving without a license, and failing to provide proof of insurance. *Id.* at 2a.

3. Petitioner and her husband filed suit under 42 U.S.C. 1983 against respondent Turek, the Chief of Police, and the City of Lago Vista. Pet. App. 3a. The complaint alleges denials of petitioner's constitutional rights under the Fourth and Fifth Amendments and violations of state law, and seeks compensatory, special, and exemplary damages. J.A. 22-40.

The district court granted summary judgment for the respondents (Pet. App. 50a-63a) on the ground that petitioners' claims were "meritless," *id.* at 51a, in light of petitioner Atwater's admission that her conduct violated the criminal law and her failure to allege that she "was harmed or detained in any way inconsistent with the law," *id.* at 56a-57a.

[3] Respondent Turek had previously stopped petitioner for what he perceived to be a seatbelt violation, but then learned that, although petitioner's son was seated up on the vehicle's armrest, he was wearing a seatbelt. Pet. App. 30a.

4. A panel of the court of appeals reversed. Pet. App. 28a-49a. The court held that petitioner's claim that respondent Turek yelled at her and arrested her for the seatbelt violations properly alleged an unreasonable seizure under the Fourth Amendment. *Id.* at 33a. The panel also held that respondent Turek was not entitled to qualified immunity because "Supreme Court precedent clearly established" that "an arrest for a first-time seat belt offense is indeed an extreme practice" subject to a "balancing analysis to determine the reasonableness of the police activity." *Id.* at 44a.[4]

5. The en banc court of appeals reversed. Pet. App. 1a-27a. Relying on this Court's decision in *Whren* v. *United States*, 517 U.S. 806 (1996) (Pet. App. 4a), the majority held that an arrest based on probable cause is reasonable under the Fourth Amendment except in those "rare" instances where the arrest is "conducted in an extraordinary manner" that is "unusually harmful to an individual's privacy or even physical interests," *ibid.*, such as the use of deadly force, physical penetration of the body, or entry of the home, *id.* at 6a. Because "[n]either party disputes that Officer Turek had probable cause to arrest [petitioner]" and because "there is no evidence in the record that Officer Turek conducted the arrest in an 'extraordinary manner, unusually harmful'" to petitioner's privacy interests, the court held that the arrest was reasonable under the Fourth Amendment. *Id.* at 6a, 7a.

Judge Reynaldo Garza dissented on the ground that the normal practice is to issue a citation for seatbelt offenses and no reason was given for arresting petitioner. Pet. App. 8a-11a. Judge Wiener dissented on the ground that, in his view, "[b]efore a police officer can constitutionally place an individual under full custodial arrest, even with probable cause, the officer must have a plausible, articulable reason for effecting such an intrusion," *id.* at 20a, and that, in the absence

[4] The panel also reinstated the claims against the City, but it affirmed dismissal of the claims against the Chief of Police. Pet. App. 49a.

of such a reason, the arrest constitutes the infliction of "punishment" on the individual, *id.* at 18a. Judge Dennis dissented on the ground that the Fourth Amendment incorporates the common-law prohibition on arrests for misdemeanors that do not involve a breach of the peace. *Id.* at 20a-27a.

SUMMARY OF ARGUMENT

Petitioner's arrest for violation of a state criminal law satisfied the requirements of the Fourth Amendment. The arrest was supported by probable cause to believe that petitioner had violated the criminal law; indeed, she has never denied the violations nor disputed the existence of probable cause. Because probable cause existed and the seizure was not effected in an extraordinary or unusual manner, the arrest was reasonable within the meaning of the Fourth Amendment.

1. There is no basis for concluding that the Fourth Amendment permits a warrantless arrest for a misdemeanor only if the violation involves a breach of the peace. The common law expressly recognized that the arrest authority of police could be expanded by statute to include arrests like the one at issue in this case, and the longstanding practice of the federal government and every State confirms that understanding. Moreover, the phrase "breach of the peace" itself lacked an established meaning at common law, such that, even if it were incorporated into the Fourth Amendment, it would not restrict arrests in the manner advocated by petitioner. Indeed, this Court has recognized that the congressional immunity from arrest for a "breach of the peace" found in Article I, Section 6 of the Constitution embraces all violations of the criminal law. Finally, the reasonableness of an arrest under the Fourth Amendment should not turn on malleable and diverse legislative classifications of crimes as misdemeanors or felonies, or on variable judicial definitions of "breach of the peace."

2. The Fourth Amendment permits a custodial arrest even though the law at issue is punishable only by a fine. The common law did not foreclose arrests for fine-only offenses, and established practice permits them. Furthermore, the propriety of an officer's decision to arrest based on probable cause—and his potential liability for money damages—should not vary based on the punishment that ultimately ensues weeks, months, or years later. And there is no basis for concluding that a jurisdiction's decision to penalize a violation by a sanction other than imprisonment means that the government lacks a strong interest in effective enforcement of that law. Where probable cause exists, a jurisdiction's decision to enforce the criminal law through a custodial arrest is not constitutionally suspect simply because a less intrusive enforcement method may arguably be available.

ARGUMENT

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, *Payton* v. *New York*, 445 U.S. 573, 576 (1980), provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Outside the home, the Fourth Amendment does not require a warrant in order to justify an arrest based on probable cause. *Payton*, 445 U.S. at 590-591; *Gerstein* v. *Pugh*, 420 U.S. 103, 113 (1975). Rather, a police officer's "on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-114.

This Court has never invalidated a routine arrest for a criminal offense based on probable cause. To the contrary, the Court recently reaffirmed that the "result of [the Fourth Amendment's reasonableness inquiry] is not in doubt where the search or seizure is based upon probable cause." *Whren* v. *United States*, 517 U.S. 806, 817 (1996); see also *Brown* v. *Texas*, 443 U.S. 47, 50 (1979) (balancing of public and individual's interests is reserved for "seizures that are less intrusive than a traditional arrest"); *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979) (the "long-prevailing standard[]" of probable cause "embodie[s] the best compromise that has been found for accommodating [the] often opposing interests in safeguard[ing] citizens from rash and unreasonable interferences with privacy and in seek[ing] to give fair leeway for enforcing the law in the community's protection. The standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment.") (internal quotation marks and citation omitted).

Indeed, the only cases in which this Court has applied a balancing analysis to arrests based on probable cause have been when the search or seizure was effectuated in an "extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body." *Whren*, 517 U.S. at 818 (citations omitted); see also *Dunaway*, 442 U.S. at 208 (probable cause standard "applie[s] to all arrests, without the need to balance the interests and circumstances involved in particular situations").

If the allegations of the complaint are subsequently shown to be true, there would be little question that respondent Turek behaved in an inappropriate and unprofessional manner. But the arrest of Gail Atwater was nevertheless per-

missible under the Fourth Amendment. Petitioners' and their amici's effort to discard the long-established probable cause standard for arrests finds no basis in the Fourth Amendment, this Court's precedents, or the practicalities of law enforcement.

I. WARRANTLESS MISDEMEANOR ARRESTS BASED ON PROBABLE CAUSE ARE REASONABLE UNDER THE FOURTH AMENDMENT REGARDLESS OF WHETHER THE OFFENSE CONSTITUTES A "BREACH OF THE PEACE"

A. No Source Of Law Supports Imposing On The Fourth Amendment A "Breach Of The Peace" Requirement For Misdemeanor Arrests

Petitioners (Br. 13-20) and their amici (Cato Inst. Br. 3-7; NACDL Br. 15-17; ACLU Br. 20-21) argue that the arrest of petitioner Atwater was unreasonable because the common law generally prohibited warrantless arrests for misdemeanors that did not involve breaches of the peace. It is true that the common law rule for warrantless misdemeanor arrests "[was] *sometimes* expressed" as limited to "when a breach of the peace has been committed in [the officer's] presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." *Carroll* v. *United States*, 267 U.S. 132, 157 (1925) (quoting 9 *Halsbury's Laws of England* (*Halsbury*) pt. III, § 612, at 299 (1st ed. 1909)) (emphasis added). But that statement of the common law does not suggest that a parallel rule should exist under the Fourth Amendment. The common law itself, this Court's cases, and a pattern of arrest authorization statutes make clear that Congress and the States may expand upon the common law arrest authority.

1. The common law specifically recognized that an officer's arrest authority could be expanded by statute. 10 *Halsbury* § 632, at 342 (3d ed. 1955) ("An arrest without a warrant may be under a power conferred by common law or by statute."). Statutorily conferred arrest authority was not confined to breaches of the peace. For example, night watchmen could "arrest *all* offenders, and particularly night-walkers, and commit them to custody till the morning." 4 W. Blackstone, *Commentaries on the Laws of England* 289 (1769) (emphasis added); see also 2 W. Hawkins, *A Treatise of Pleas of the Crown* ch. 13, preface & § 5, at 79-80 (1795) (authority of night watchmen to arrest "any Stranger * * * until Morning," without "Process from some Court of Record"). Under the Pedlar's Act of 1871, a police officer could arrest a pedlar who "refuses to show his certificate or has no certificate," 10 *Halsbury* § 641, at 348 n.s, and under the Hawkers Act of 1888, a "peace officer may arrest a person found hawking without a license or not producing a licence on demand," *id.* § 642, at 350 n.f. Officers could also arrest without a warrant "in connexion with the protection of * * * musical copyright." *Id.* § 642, at 350.

Accordingly, "it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute." *Welsh* v. *Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (internal quotation marks omitted); H. Wilgus, *Arrest Without A Warrant*, 22 Mich. L. Rev. 541, 550 (1923-1924) (Wilgus) ("The states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence.") (citing cases) (footnotes omitted)); *id.* at 705-706.[5]

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[5] See also *Oleson* v. *Pincock*, 251 P. 23, 25 (Utah 1926); *Conrad* v. *Lengel*, 144 N.E. 278, 278 (Ohio 1924); *Burroughs* v. *Eastman*, 59 N.W. 817, 819-820 (Mich. 1894); *White* v. *Kent*, 11 Ohio St. 550, 554 (1860); 10

2. This Court's descriptions of the common law rule for misdemeanor arrests, moreover, have generally omitted the breach of the peace limitation and have focused, instead, on the requirement that the misdemeanor be committed in the officer's presence.[6] See, *e.g.*, *Payton*, 445 U.S. at 590 n.30 ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence."); *United States* v. *Watson*, 423 U.S. 411, 418 (1976) (same).[7]

Likewise, most lower courts that have addressed the issue have held that the Fourth Amendment does not bar warrantless misdemeanor arrests, regardless of whether the offense constitutes a breach of the peace or is punishable only by fine.[8] The common law "breach of the peace" limitation that petitioners and their amici suggest should be incorporated into the Fourth Amendment thus has not been

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Halsbury §§ 641, 642, at 347-351 (discussing statutory powers of police to arrest without a warrant).

[6] The requirement that the misdemeanor be committed in the officer's presence is not at issue in this case. Cf. *Welsh*, 466 U.S. at 756 (White, J., dissenting) ("But the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); 3 W. LaFave, *Search and Seizure* § 5.1(b), at 21 (3d ed. 1996).

[7] See also *Johnson* v. *United States*, 333 U.S. 10, 15 (1948); *Carroll*, 267 U.S. at 156 ("The usual rule is that a police officer * * * may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."); *John Bad Elk* v. *United States*, 177 U.S. 529, 534 (1900) ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz* v. *Moffitt*, 115 U.S. 487, 498-499 (1885); see also *Davis* v. *United States*, 328 U.S. 582, 614 (1946) (Frankfurter, J., dissenting).

[8] See *Higbee* v. *City of San Diego*, 911 F.2d 377, 379-380 (9th Cir. 1990); *United States* v. *Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989); *Fisher* v. *Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 & n.6 (4th Cir. 1982); *Street* v. *Surdyka*, 492 F.2d 368, 370-373 (4th Cir. 1974). But see *Staker* v. *United States*, 5 F.2d 312, 314 (6th Cir. 1925).

treated as an essential aspect of the common law arrest power.

3. The breach of the peace limitation on misdemeanor arrests also finds no support in the legislation of Congress or the States. While Congress has generally retained the "in the presence" requirement for misdemeanor arrests by federal law enforcement officers, no federal statute confines misdemeanor arrests to breaches of the peace. See, *e.g.*, 18 U.S.C. 3052 (FBI agents authorized to "make arrests without warrant for any offense against the United States committed in their presence"), 3053 (same, for U.S. marshals and deputies), 3056(c)(1)(C) (same, for Secret Service).[9] "Because there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" *Watson*, 423 U.S. at 416 (quotation marks omitted), Congress's consistent omission of a breach of the

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[9] See also 16 U.S.C. 460*l*-6a(e) (authorizing arrest without a warrant for fine-only offenses committed in national parks or federally administered recreation sites or facilities); 18 U.S.C. 3061(a)(2) (postal inspectors may "make arrests without warrant for offenses against the United States committed in their presence"), 3063(a)(3) (same for Environmental Protection Agency officers); 19 U.S.C. 1589a(3) (same for customs officers); 21 U.S.C. 878(a)(3) (same for Drug Enforcement Administration officers); 25 U.S.C. 2803(3)(A) (Bureau of Indian Affairs officers may "make an arrest without a warrant for an offense committed in Indian country if * * * the offense is committed in the presence of the employee"); 28 U.S.C. 566(d) (in protecting courts and federal judicial officers, a U.S. marshal may "make arrests without warrant for any offense against the United States committed in his or her presence"); see generally U.S. Gen. Acct. Ofc., *Federal Law Enforcement: Investigative Authority and Personnel at 32 Organizations* App. II & III (GAO/GGD-97-93, Sept. 1996); U.S. Gen. Acct. Ofc., *Federal Law Enforcement: Investigative Authority and Personnel at 13 Agencies* App. I & II (GAO/GGD-96-154, Sept. 1996). Congress has also authorized certain law enforcement officers to effect warrantless arrests for specific offenses, some of which are not felonies. See, *e.g.*, 16 U.S.C. 668b(a), 670j(b)(1), 690e(a), 706, 727(a), 742j-1(d), 831c-3(b), 916g, 959(d)(1), 971f(a)(2), 972g(d), 1172(d), 1338(b), 1377(d)(1), 1540(e)(3), 3375(b); 21 U.S.C. 372(e)(4); 22 U.S.C. 1978(f)(4)(A); 33 U.S.C. 446, 452, 1321(m)(1)(B); 50 U.S.C. App. 2411(a); 16 U.S.C. 668dd(g) (Supp. IV 1998); 16 U.S.C. 5506(c)(1)(A) (1994 & Supp. IV 1998).

peace requirement for warrantless misdemeanor arrests counsels strongly against incorporating such a limitation into the Fourth Amendment.

All fifty States and the District of Columbia, likewise, authorize at least some (if not all) of their law enforcement officers to execute warrantless misdemeanor arrests in the absence of a breach of the peace. See, *e.g.*, Ala. Code § 15-10-3(a)(1) (1995 & Supp. 1999) (authorizing warrantless arrest for any "public offense" committed in the presence of the officer); Ariz. Rev. Stat. Ann. § 13-3883(a)(2) (West Supp. 1999) (authorizing arrest without a warrant when a misdemeanor has been committed in the officer's presence).[10] The Model Code of Prearraignment Procedure similarly authorizes warrantless arrests where the officer has reasonable cause to believe that the person has committed "a misdemeanor or petty misdemeanor in the officer's presence." *Model Code of Prearraignment Procedure* § 120.1, at 13 (1975). Academic scholars have also long acknowledged the propriety in this country of warrantless arrests for misdemeanors even if they do not amount to a breach of the peace.[11]

4. In some contexts, common law limitations that take root in this country may suggest that a similar constraint applies under the Fourth Amendment. See *Wilson* v. *Arkansas*, 514 U.S. 927, 933 (1995) (common law "knock and announce" principle incorporated into Fourth Amendment in

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[10] We have collected representative state statutes in an appendix to this brief. See App. B, *infra*. See also W. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 847 (1993).

[11] See, *e.g.*, H. Voorhees, *The Law of Arrest in Civil and Criminal Actions* § 131, at 78-79 (1904) ("[B]y authority of statute, city charter, or ordinance, [an officer] may arrest without a warrant, one who, within his jurisdiction, commits a misdemeanor other than a breach of the peace, as, for example, one who is violating a city ordinance, without breaking the peace.") (footnotes omitted); *id.* § 146, at 85; Wilgus 541, 550; 3 W. LaFave, *supra*, § 5.1(b), at 12-23.

part because the rule "was woven quickly into the fabric of early American law"). But this Court "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Tennessee* v. *Garner*, 471 U.S. 1, 13 (1985) (quoting *Payton*, 445 U.S. at 591 n.33); see also *Payton*, 445 U.S. at 600 (noting that "custom and *contemporary norms* necessarily play * * * a large role in the constitutional analysis" of what is "reasonable" under the Fourth Amendment) (emphasis added); *Warden* v. *Hayden*, 387 U.S. 294, 300-310 (1967) (rejecting common-law prohibition against searches for "mere evidence").

In this context, where the common law itself acknowledged that legislatures were not bound by a breach of the peace limitation, and where "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause" for misdemeanors, *Watson*, 423 U.S. at 423, transposition of a breach of the peace limitation into the Fourth Amendment is unwarranted.

5. Even if some form of the "breach of the peace" limitation had taken root in the Fourth Amendment, the phrase "breach of the peace" had different meanings at common law. While some definitions focused (like petitioners and their amici) on conduct that threatened violence, disorder, or disruption, the common law at other times employed "breach of the peace" to refer to all violations of the criminal law. See, *e.g.*, H. Voorhees, *The Law of Arrest in Civil and Criminal Actions* § 117, at 72 (1904) ("a breach of the public peace is the invasion of the security and protection which the law affords every citizen"); Wilgus 574 (under the statute of Charles II, "it was held that every indictable offense was constructively a breach of the peace * * * [and] disobeying

any act of parliament was a breach of the peace") (footnotes omitted).[12]

Indeed, this Court has adopted the broader construction of "breach of the peace" in interpreting the legislative immunity from arrest granted Members of Congress by Article I, Section 6 of the Constitution, which in relevant part provides: "The Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." As this Court has explained:

> [W]hen the Constitution was written the term "breach of the peace" did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law.

United States v. *Brewster*, 408 U.S. 501, 521 (1972).[13]

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[12] See also *City of Boerne* v. *Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring) (citing English cases to the effect that "[E]very breach of a law is against the peace."); *id.* at 540 & n.2; *City of Akron* v. *Mingo*, 160 N.E.2d 225, 228-231 (Ohio 1959); *State ex rel. Thompson* v. *Reichman*, 188 S.W. 225, 228 ("The term 'breach of the peace' is generic and includes all violations of public peace or order, or acts tending to the disturbance thereof."), on reh'g, 188 S.W. 597, 602 (Tenn. 1916) ("[W]hat can be more logical than to say that every violation of a criminal law is a breach of the peace of the state?"). The common law also recognized that the crimes constituting a breach of the peace could be expanded by statute. Wilgus 575 (noting that the phrase had been expanded to include, for example, desecrating the national flag and transporting intoxicating liquor); *Reichman*, 188 S.W. at 607.

[13] See also *Williamson* v. *United States*, 207 U.S. 425, 444 (1908) ("Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses, as well those which are in fact attended with force and violence, as those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order."); J. Story, *Commentaries on the Constitution of the United States* § 438, at 308 (Carolina Academic Press 1987) (same).

Petitioners' argument thus attempts to import into one provision of the Constitution an interpretation of "breach of the peace" that is quite different from the meaning the Framers ascribed to that phrase when drafting Article I. At a minimum, the established constitutional definition and other common law authority demonstrate that the meaning of "breach of the peace" was sufficiently unsettled to preclude elevating petitioners' restrictive reading of the phrase to the level of constitutional rule. See *Payton*, 445 U.S. at 598.

B. Constitutionalizing Restrictions On Probable-Cause-Based Arrests That Rest On The Common Law Distinction Between Felonies And Misdemeanors Would Be Unworkable

Petitioners' and their amici's effort to impose constitutional limits on misdemeanor arrests is predicated upon an anachronistic distinction between felonies and misdemeanors that has little relevance to modern criminal law. At common law, felonies consisted of crimes punishable by death or forfeiture of land. See 1 J. Stephen, *A History of the Criminal Law of England* 458 (1883).[14] The term "misdemeanor" comprised all remaining crimes except treason. See, *e.g.*, Wilgus 572.

Because of the statutory codification of criminal law in most American jurisdictions, many of the crimes considered to be misdemeanors at common law—such as assault, attempted felonies, forgery, and kidnaping—are now consid-

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Petitioners suggest (Br. 13-17) that the common law permitted warrantless arrests only for felonies and breaches of the "Public Peace," and that the term "breach of the king's peace," which encompassed all criminal laws, was not applied in delineating the power to arrest. The analysis in *Brewster*, however, which was concerned with a constitutional "privilege[] against Arrest," did not draw that distinction. See also Voorhees § 117, at 72 (all violations of the criminal law are "breach[es] of the public peace").

[14] See also *Garner*, 471 U.S. at 13-14; *Kurtz*, 115 U.S. at 499; Voorhees § 115, at 70-71; Wilgus 569.

ered felonies. See, *e.g.*, *Garner*, 471 U.S. at 14, 20 (statutory changes in the classification of crime have "made the assumption that a 'felon' is more dangerous than a misdemeanant untenable"; distinction is "highly technical" and "arbitrary"). Indeed, "[i]n this country there is no generally accepted meaning of the[] terms" felony and misdemeanor "except as given by statute." Wilgus 570; *Carroll*, 267 U.S. at 158 ("Under our present federal statutes, [the distinction between felonies and misdemeanors] is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors.").[15]

Petitioner's proposed constitutional rule, if construed literally, would thus place undue weight on the vagaries of legislative classifications of crime. As a result, the same crime committed by the same defendant would constitutionally be subject to warrantless arrest in one jurisdiction and to only a summons or citation in another jurisdiction. For example, stalking by telephone or letter, or violation of a protective order in a domestic violence case (neither of which would necessarily have been considered a breach of the public peace under petitioners' definition) is treated as a felony in some States and a misdemeanor in others. See U.S. Dep't of Justice, Office of Justice Programs, *Stalking and Domestic Violence: The Third Annual Report to Congress Under the*

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[15] See also *Hammer* v. *Gross*, 932 F.2d 842, 853 (9th Cir.) (en banc) (Kozinski, J., concurring) (noting that, while California classifies drunk driving as a misdemeanor, impersonating a bride or bridegroom is a felony), cert. denied, 502 U.S. 980 (1991); Wilgus 573; 1 Stephen, *supra*, at 489 ("A large number of misdemeanours were created by statute at different times, but especially in the eighteenth and nineteenth centuries, which differ in no essential respect from the common crimes distinguished as felonies."); 2 Stephen, *supra*, at 189, 193 ("[S]ince the substitution of milder punishments for death, the distinction [between felonies and misdemeanors] has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render the offender liable to punishments as severe as those which are now usually inflicted upon persons convicted of felony.").

Violence Against Women Act 24-26 & App. B (July 1998) (chronicling state legislation).[16] And the State of New Jersey appears to classify most of its crimes as misdemeanors. N.J. Stat. Ann. §§ 2C:1-4, 2C:1-5 (West 1995). This Court should be hesitant to constitutionalize legislative labels that are often the "result[] of evolution or accident" (Wilgus 568) and to adopt a rule under which "the search and seizure protections of the Fourth Amendment are so variable" (*Whren*, 517 U.S. at 815).

The misdemeanor/felony distinction would also prove difficult to apply by police officers on the street. Frequently the line between felony and misdemeanor conduct is dependent upon the offender's prior criminal history or the amount of money or of a drug at issue. See, *e.g.*, 18 U.S.C. 510 (1994 & Supp. IV 1998) (forgery of Treasury checks under $500 is a misdemeanor); 21 U.S.C. 841, 842, 844 (1994 & Supp. IV 1998). A police officer who witnesses the forgery of a Social Security check or an individual possessing an unknown quan-

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[16] See also U.S. Dep't of Justice, Bureau of Justice Assistance, *Regional Seminar Series on Developing and Implementing Antistalking Codes* 53-55 (Table 9) (June 1996); Institute for Law and Justice, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers* (*Domestic Violence*) 2, 7-10, 25 (Mar. 1998); Institute for Law and Justice, *State Stalking Legislation: A Status Report—1997* (*State Stalking Legislation*), at 5 (Exh. 1) and Apps. 1 & 2 (Mar. 1998).

At least 28 States and the District of Columbia, moreover, mandate or strongly encourage arrests in stalking and domestic violence cases as a matter of policy. Petitioner's proposed construction of the Fourth Amendment could imperil some of those important law enforcement policies and programs. *State Stalking Legislation* 19 (Exh. 4) (documenting States that authorize arrests without a warrant for stalking); *Domestic Violence* 12 ("Today all but 1 state authorizes warrantless arrests of domestic violence offenders based solely on a probable cause determination," and "[i]n 20 states and the District of Columbia police arrest is required when the officer determines that probable cause exists."), 13, 76 (48 states authorize warrantless arrests based on a probable cause determination that a protective order has been violated). The laws of thirteen States explicitly bar police from simply issuing citations or appearance tickets in lieu of a formal arrest in domestic violence cases. *Domestic Violence* 16.

tity of drugs (neither of which would necessarily qualify as a breach of the peace in petitioners' view) will not know whether a warrantless arrest is permitted until after the offender is seized, the evidence collected, and the defendant's criminal history checked. See *Berkemer* v. *McCarty*, 468 U.S. 420, 430-431 (1984) ("The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. * * * Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind.") (footnote omitted).

Nor can it be assumed that misdemeanors that do not amount to a breach of the peace are less serious crimes for which enforcement can be relaxed at little social cost. The forgery of a poor, elderly person's $400 Social Security check (18 U.S.C. 495, 510 (1994 & Supp. IV 1998)) may distress and financially embarrass that victim. An officer's arrest of an individual who mutilates federal bank notes by removing the corner dollar values (18 U.S.C. 333) may expose a counterfeiting operation that would cost the taxpayers a significant amount of money. And domestic violence that does not rise to petitioners' definition of a common law breach of the peace (such as where the victim of a battery does not scream or otherwise disturb the public, see Voorhees § 121, at 74) may nevertheless inflict considerable suffering on the victim.

II. THE FOURTH AMENDMENT PERMITS ARRESTS BASED ON PROBABLE CAUSE FOR OFFENSES, INCLUDING TRAFFIC OFFENSES, THAT ARE NOT PUNISHABLE BY INCARCERATION

Petitioners' alternative contention (Br. 11-13, 23-26) is that, even when the police possess probable cause, they may not effectuate an arrest if the authorized punishment for the violation is a fine. The fact that an offense is not punishable by incarceration, however, does not strip the offense of its

criminal character. Nor does it diminish the governmental interest in ensuring compliance with the law and the imposition of authorized penalties.

A. Fines Have Long Been An Important Means Of Enforcing The Criminal Law

Fines have a long history in the criminal law. In 1413, persons found guilty of forging property deeds were required to "make fine and ransom at the king's pleasure." 3 Stephen, *supra*, at 181. Offenses as varied as "cutting off the ears of the king's subjects," burning carts loaded with coal, bribery in parliamentary elections, and the unlawful collection of interest were, for a period of time, punishable only by a fine. *Id.* at 189, 198, 253. Cases specifically recognized that "ordinances punishing by fine" certain types of misconduct "were *penal* laws." Wilgus 551 n.60 (citing *County of Wayne* v. *City of Detroit*, 17 Mich. 390 (1868), and *People* v. *Controller*, 18 Mich. 445, 576 (1869)).

In the modern day, government continues to rely upon fines as an important means of punishing crime. Congress has created more than 85 criminal offenses for which a fine is the only authorized sanction. See, *e.g.*, 14 U.S.C. 84 (interference with aids to navigation); 15 U.S.C. 1338 (cigarette labeling and advertising); 16 U.S.C. 422d, 423f (vandalism at national monuments and military parks); 18 U.S.C. 243 (exclusion of jurors on account of race or color), 244 (discrimination against person wearing uniform of the armed forces), 475, 489 (imitating or reproducing U.S. obligations, securities, or coins); see also App. A, *infra*.

The arguments of petitioners and their amici assume that the decision to withhold incarceration as punishment for a crime diminishes the seriousness of the offense. While the type of sanction authorized is an important indication of seriousness, *Welsh*, 466 U.S. at 754 n.14; see *Lewis* v. *United States*, 518 U.S. 322, 326 (1996), the sanction chosen by government cannot be the sole, dispositive factor in evaluating

the public's interest in enforcement. The selection of a punishment for a crime reflects a complicated judgment about the nature of the crime, its cost to society, and the best means of deterring violations, promoting rehabilitation, and other factors. For example, many prosecutors' offices have adopted diversion programs for first-time domestic violence and drug offenders. First-time offenders are given probation and required to meet a variety of educational, employment, and counseling requirements, in lieu of incarceration. See also *Bearden* v. *Georgia*, 461 U.S. 660, 662 (1983) (discussing the Georgia First Offender's Act). It is true that incarceration remains a potential penalty in the diversion-program cases. But that does not significantly distinguish the case at hand, because individuals who refuse to pay the fine for an ordinance violation (for reasons other than poverty) often can be jailed. See, *e.g.*, 65 Ill. Comp. Stat. Ann. § 5/1-2-1 (West 1996); *Bearden*, 461 U.S. at 668; *Tate* v. *Short*, 401 U.S. 395, 400 (1971).

A decision to limit the sanction for a violation to a fine thus does not translate into a lack of interest in or commitment to enforcing the law. Given the exploding prison population and the generally high recidivism rates for released prisoners,[17] governments that experiment with alternatives to incarceration, such as fines, should not find their hands tied in enforcing and implementing those alternative sanctions. Nor should the Fourth Amendment categorically declare that such experimentation, as a matter of constitutional law, reflects such a diminished community interest in law enforcement that probable cause arrests are impermissible.

[17] See U.S. Bureau of Justice Statistics, *Prison Statistics* (1999), available at http://www.ojp.usdoj.gov/bjs/prisons.htm; U.S. Bureau of Justice Statistics, *Survey of State Prison Inmates* 11 (1991); U.S. Bureau of Justice Statistics, *Offenders Returning to Federal Prison, 1986-97* (Sept. 2000).

B. The Fourth Amendment Permits Seizures For Offenses Punishable Only By Fine

This Court's decisions have recognized that the Fourth Amendment does not preclude seizures where the offense is not punishable by incarceration. Stops for traffic violations have long been permitted without reference to the potential penalty for the infraction. See, *e.g.*, *Pennsylvania* v. *Mimms*, 434 U.S. 106, 107 (1977) (driving with expired license plate).[18] Recently, in *Whren* v. *United States*, *supra*, this Court unanimously rejected an effort to require more than probable cause to justify a seizure for a "civil" traffic violation, 517 U.S. at 808. The petitioners in *Whren* argued that, in analyzing the reasonableness of the seizure, courts should factor in the purportedly diminished governmental interest in enforcing "minor traffic infractions." *Id.* at 816-817. While acknowledging "in principle" that every Fourth Amendment case entails a balancing of relevant factors, the Court held that "the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Id.* at 817. The officer's "probable cause to believe the law has been broken" necessarily "'outbalances' private interest in avoiding police contact." *Id.* at 818.[19]

[18] See also *Michigan* v. *DeFillippo*, 443 U.S. 31, 36-40 (1979); *Gustafson* v. *Florida*, 414 U.S. 260, 265 (1973); *United States* v. *Robinson*, 414 U.S. 218, 234-235 (1973).

[19] The Court ruled that actual balancing is reserved for those cases where probable cause is absent or the seizure is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818. Such extraordinary searches or seizures include surgical intrusion (*Winston* v. *Lee*, 470 U.S. 753 (1985)), the use of deadly force (*Tennesse* v. *Garner*, *supra*), or warrantless or unannounced entries into the home (*Wilson* v. *Arkansas*, *supra*; *Welsh*, 466 U.S. at 740). None of those activities nor anything remotely like them occurred here.

The Court rejected the *Whren* petitioners' objections that traffic laws are so multitudinous and inadvertently violated as to render the stops "extraordinary," stating:

> [W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

517 U.S. at 818-819.

This case involves a short custodial arrest, and *Whren* involved a stop. But both qualify as seizures under the Fourth Amendment. *Whren*, 517 U.S. at 809-810; *Watson*, 423 U.S. at 414- 424. Furthermore, the extent of the seizure was not a factor in the *Whren* Court's analysis precisely because such balancing was deemed unnecessary for routine seizures based on probable cause. See 517 U.S. at 817; see also *Robbins* v. *California*, 453 U.S. 420 450 (1981) (Stevens, J., dissenting) ("As a matter of constitutional law, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody.") (footnote omitted), overruled, *United States* v. *Ross*, 456 U.S. 798 (1982). Surely, here, where a violation of the *criminal* law is involved, as much as for *Whren*'s civil violation, "there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure," and so "infraction itself" should remain "the ordinary measure of the lawfulness of enforcement." *Whren*, 517 U.S. at 818-819.[20]

[20] In *Welsh*, the Court held that a State's classification of an offense as noncriminal and the modest sanction imposed were relevant in assessing whether officers could make a warrantless arrest in the home. 466 U.S. at 752-754. *Whren*, however, makes clear that, for routine seizures based on probable cause outside the home, such considerations play no part in the constitutional analysis. 517 U.S. at 818; see also *Schmerber* v. *California*, 384 U.S. 757, 766-772 (1966).

A custodial arrest may serve valid purposes even where the authorized penalty upon conviction is not incarceration. The police may need to preserve evidence, confirm the suspect's identity, defuse and control a situation, or abate a continuing violation. Jurisdictions that mandate or encourage arrests of individuals who violate domestic violence protective orders, shoplifters, or runaways may consider their arrest policy part of a larger law enforcement strategy designed to cure minor violations before a pattern of criminality develops. Furthermore, governments may legitimately and reasonably determine that their officers should not be forced to make spot decisions in the heat of an encounter about the reliability of a suspect's identification, promise to appear in court, or promise not to repeat the offense. Relatedly, jurisdictions may reasonably determine, for a variety of reasons, that officers should not be required to process paperwork and both determine the appropriateness of and collect cash bonds at the scene of an arrest. Those purposes justify the arrest even where the legislature does not deem it necessary to punish violators upon conviction with incarceration.

Nor, contrary to the argument of Judge Wiener in dissent below (Pet. App. 18a, 20a), does an arrest and its attendant processing at a police station entail the unconstitutional infliction of "punishment" on defendants facing fines. This Court has long recognized that probable cause "provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S. at 113-114; see also *United States* v. *Salerno*, 481 U.S. 739, 749 (1987) ("If the police suspect an individual of a crime, they may arrest and hold him until a neutral magistrate determines whether

probable cause exists."). Arrest and booking thus represent not punishment, but the admnistrative processing of a criminal suspect—a type of seizure that is reasonable, within the meaning of the Fourth Amendment, if predicated on probable cause. And the government's authority to initiate the criminal process has never been held to depend upon the type of punishment authorized for the offense charged.[21]

Indeed, this Court has generally characterized even significant periods of pretrial detention as a "regulatory restraint," rather than punishment. See *Bell* v. *Wolfish*, 441 U.S. 520, 537 (1979); see also *Salerno*, 481 U.S. at 746 ("[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment."); *id.* at 748 (pretrial detention under the Bail Reform Act "is regulatory in nature"). In light of the Court's conclusion that the lengthy and intrusive forms of detention in *Bell* and *Salerno* do not constitute punishment, the suggestion that the one hour petitioner Atwater spent being administratively processed at the station house constituted punishment fails.[22]

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[21] See *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981); *Higbee*, 911 F.2d at 380 ("Plaintiffs were not being punished. They were merely being taken to jail to be booked and processed in the customary manner."); *Reichman*, 188 S.W. at 230 (because it serves a distinct law enforcement purpose, arrest for violation of liquor laws is permissible even though imprisonment may not be available as punishment); Wilgus 543 (an arrest "is the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.") (footnote and internal quotation marks omitted); W. LaFave, *Arrest: The Decision to Take a Suspect into Custody* 186-189 (1965); 4 Blackstone, *supra* at 286; cf. *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990) ("One of the most important duties of a prosecutor pursuing a criminal proceeding is to ensure that defendants * * * are present at trial."); *Lerwill* v. *Joslin*, 712 F.2d 435, 438 (10th Cir. 1983) (arrest brings the subject before the court and subjects him to its immediate authority, without which "the initiation of a prosecution would be futile").

[22] The officer's subjective motivation is irrelevant to this inquiry. *Whren*, 517 U.S. at 813.

C. A Distinction In Arrest Authority Based On Punishment Poses Enforcement Difficulties

Like the effort to confine misdemeanor arrests to breaches of the peace, a constitutional rule that allows arrests only for offenses punishable by imprisonment raises problems of practical implementation. A number of laws make first offenses punishable by a fine or other non-incarceration penalty, but permit incarceration for subsequent offenses.[23] A police officer witnessing an offense on the street, however, has no way of knowing whether the perpetrator is a first-time offender.[24] Failure to arrest could leave a repeat offender on the street; arrest could subject the officer to personal liability for damages. "This is certainly a very unsatisfactory line of difference" for police officers to administer. *Carroll*, 267 U.S. at 157.

Petitioners' proposal (Br. 46) that the Fourth Amendment ban all arrests for fine-only offenses unless the arrest is "necessary" for enforcement of the laws or the "offense would otherwise continue and pose a danger to others" will likewise be difficult to implement on the streets.[25] For

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[23] See, *e.g.*, *Welsh*, 466 U.S. at 746 (first offense is a civil infraction punishable by $200 fine; subsequent offenses punishable by imprisonment of up to one year); *Carroll*, 267 U.S. at 154; Va. Code § 18.2-266.1(B) (Michie 1996); *id.* § 18.2-270 (Michie 1996 & Supp. 1999) (first-time offense of driving while intoxicated punishable by license suspension and fine; subsequent offenses are punishable as a misdemeanor by fine and imprisonment; third offense within ten years is a felony); Ala. Code § 32-5A-191(b) (Michie 1999) (first-time offense of driving under the influence subject only to license suspension if driver is under 21); Wis. Stat. Ann. § 346.65(2)(a) (West 1999) (first-time offense of driving under the influence punishable only by a fine).

[24] Not all jurisdictions can afford to equip every police car with up-to-date computers. Even for those that can, computers often break down or, due to heavy usage, communications are significantly delayed.

[25] Petitioners propose (Br. 46) to limit their rule to traffic offenses, but they offer nothing other than *ipse dixit* and the already-rejected argument that traffic offenses are multitudinous (see *Whren*, 517 U.S. at 818-819) to explain why such an artificial category should be carved out of the Fourth

example, while petitioners take for granted that petitioner Atwater's checkbook (she had no other form of identification with her, Pet. App. 30a) satisfactorily established her identification in a small-town setting based on the officer's subjective knowledge, it is far from clear whether and under what circumstances (such as urban settings or areas with transient populations, like many of the specialized jurisdictions policed by federal officers) an officer's arrest of a person who, like petitioner Atwater, has committed multiple traffic offenses and offers only a checkbook for identification will be deemed objectively unreasonable under the Fourth Amendment. See *Knowles* v. *Iowa*, 525 U.S. 113, 119 (1998) ("[I]f a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation.").[26] Similarly, while petitioners' test (Br. 46) professes to reserve the ability to arrest traffic offenders to prevent recurrence of the offense, they offer no guidelines by which courts can review the assessment of officers on the scene, who frequently encounter traffic offenders for the first time, that a person stopped poses a risk of repeating the offense a few miles down the road.

Amendment. In fact, a traffic-offense line would be particularly incongruous because this Court's Fourth Amendment jurisprudence has consistently recognized that persons in automobiles have diminished—not enhanced—expectations of liberty and privacy because of the public and pervasively regulated character of automobile travel. See, *e.g.*, *New York* v. *Class*, 475 U.S. 106, 112 (1986) (noting that automobiles, unlike homes or offices, are subject to a "web of pervasive regulation"); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence."); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976) (noting the "obviously public nature of automobile travel," under which cars routinely "travel[] public thoroughfares where both [their] occupants and [their] contents are in plain view"). And if the argument that probable cause is insufficient to justify an arrest is accepted here, it is not at all clear why the Fourth Amendment would not also require balancing the need to arrest against its intrusiveness for all other misdemeanors or even some felonies, such as those involving possession-amounts of drugs or white-collar crimes, where it could equally be argued that (1) the officer unquestionably knew the suspects' identities because they were established citizens of the community, (2) they promised not to repeat the offense and they had no prior criminal record indicating that they would, and (3) they signed a promise to appear in court.

[26] Petitioners' contention (Br. 43) that permitting arrests for fine-only offenses will nullify the holding in *Knowles* is misplaced. *Knowles* did not limit the authority to arrest; it held only that a search incident to arrest is impermissible under the Fourth Amendment when a custodial arrest is not made. Any officer who searches before effectuating an arrest (see *Rawlings* v. *Kentucky*, 448 U.S. 98, 110-111 (1980)) still must make an arrest regardless of the outcome of that search, or face a Section 1983 action based on *Knowles*.

Judicial review, through the medium of personal damages actions, of an officer's on-the-spot determination that an individual is unlikely to appear in court or pay a fine will be similarly difficult. While it may be obvious when the offender destroys the citation or states that he will not pay, an officer's judgment based on more subtle indications such as body language or other indicia of credibility will be harder to defend after the fact. Yet the failure to respond to citations is a significant problem for law enforcement. We have been informed that s significant percentage of all citations issued by federal law enforcement agencies go unpaid in the absence of concerted collection efforts.

In our experience, federal officers generally do not make arrests for fine-only offenses in the absence of a good reason. Nevertheless, a constitutional rule should not be adopted that would restrict the officers' ability to make an on-the-spot assessment that an arrest is needed to maintain control of a situation, or that forces officers who have probable cause to believe that a crime has been committed, on pain of personal liability for money damages, to apply such an uncertain balancing test on the street and in the heat of an encounter. "A single, familiar standard" of probable cause "is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual

interests involved in the specific circumstances they confront." *Dunaway*, 442 U.S. at 213-214. While it no doubt frequently is good policy and a wise use of police resources not to make arrests for fine-only offenses, persons who have violated the duly enacted criminal laws of a jurisdiction have no constitutional right to be immune from routine criminal processing.

D. Legislatures Have Prevented And Can Continue To Prevent Arbitrary Law Enforcement

Quite apart from the impracticality of petitioners' proposed legal test, petitioners have failed to demonstrate that a widespread problem of abusive arrests for misdemeanors or traffic offenses exists. To the contrary, even a dissenting judge below acknowledged that the facts of the present case were "extreme" (Pet. App. 12a) and arose only in the case of the "admittedly rare rogue patrol officer" (*id.* at 19a). In the view of the federal government, moreover, although federal law authorizes arrests for seatbelt violations (36 C.F.R. 4.15), it generally is inappropriate to enforce that law other than by way of citation. In fact, the United States Park Police, in conjunction with the local district courts, have developed a "collateral list" procedure under which officers may issue citations for certain misdemeanor crimes for which arrest is otherwise authorized, including seatbelt offenses, and may either require a subsequent appearance in court or allow the offender to avoid a court appearance by paying a designated fine.[27]

[27] Further, the Department of Transportation and its National Highway Traffic Safety Administration consider arrests for seatbelt violations to be counterproductive to the national goal of increasing seatbelt compliance, because the adverse public reaction to such arrests could dissuade jurisdictions from adopting mandatory seatbelt usage laws, especially those laws that make the failure to wear a seatbelt a primary offense enforceable in its own right. See generally NHTSA, *Standard Enforcement Saves Lives: The Case for Strong Seat Belt Laws* 13 (1999) (noting that primary enforcement laws are considerably more effective in enhancing seatbelt usage, and thus reducing traffic fatalities, than those laws that permit citations for failure to wear a seatbelt only when the vehicle is stopped for a different traffic offense).

Although not presented by the facts of this case, petitioners and their amici raise concerns about discriminatory enforcement. But this Court made quite clear in *Whren* that such claims should be addressed through the Equal Protection Clause, rather than through the Fourth Amendment. 517 U.S. at 813. Indeed, amicus ACLU acknowledges (Br. 9) that courts across the country are increasingly recognizing such equal protection claims.

An additional consideration limits the risk of abusive use of the arrest power. As the brief of amicus Institute on Criminal Justice indicates, officers face enormous disincentives to arresting suspects for the commission of a minor offense. While traffic stops can take little time, occur outside the view of supervisors and other officers, and entail little if any paperwork, custodial arrests are an entirely different matter. A single arrest can consume hours of an officer's time; his actions are subject to supervisorial review and peer scrutiny at the station house; and the paper trail that attends arrests would make it much easier to document a pattern of discriminatory law enforcement. Officers also generally do not advance their own professional interests by consuming enormous amounts of time and limited police resources by arresting for minor misdemeanors and fine-only offenses. Officers who act out of vindictiveness, bias, or other improper motive may also be subject to internal disciplinary procedures. See, *e.g.*, U.S. Marshal's Office, *Code of Professional Responsibility: Standards of Conduct* (May 17, 1999), available at http://156.9.230.3/prt/policy/ directive/web/99-18.htm; see also C.A. App. 400, 407, 410 (both Chief of Police and the City mayor made clear to respondent Turek that they disapproved of his handling of petitioner Atwater's offense).

Crafting a new constitutional rule for fine-only misdemeanors is not the only available safeguard against possible abuses. As amicus ACLU demonstrates (Br. 22-25), a number of States have taken steps to limit the authority of police to arrest for misdemeanor, traffic, or fine-only offenses. See also App. C, *infra*; *Berkemer*, 468 U.S. at 437 n.26; 625 Ill. Comp. Stat. Ann. ILCS §§ 5/6-800 *et seq.* (Nonresident Violator Compact of 1977). The nature, scope, and context of the restrictions adopted, however, vary; no uniform national consensus on restricting arrest authority has emerged. Accordingly, such decisions are best made locally in light of the particular policy concerns and needs for law enforcement of individual communities, rather than homogenized through constitutional rule. Once a community has adjudged certain behavior to be criminal, the Fourth Amendment should not require police officers, who have probable cause to believe that an offense has been committed, to adopt the least restrictive or least intrusive means of enforcing the law. See *United States* v. *Sharpe*, 470 U.S. 675, 687 (1985) ("[T]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Federal Criminal Offenses Punishable By Fine Only

5 U.S.C. 552a(i) (knowingly disclosing individually identifiable information in government records, or willfully maintaining as a government employee a system of records without meeting notice requirements, or requesting or obtaining individual government records under false pretenses);

7 U.S.C. 228b-4 (while acting as a live poultry dealer or employed by such, failing to obey an order of the Secretary of Agriculture with respect to financing or payment arrangements for poultry);

7 U.S.C. 472 (failing to furnish information to the Department of Agriculture on the grades and staple length of cotton on hand and failure to permit inspection);

7 U.S.C. 608c(14) (violations of certain orders governing the handling of agricultural commodities);

7 U.S.C. 1373(a) (1994 & Supp. IV 1998) (failing to make a report on or keep a record of certain agricultural activities);

7 U.S.C. 1596 (violating any provision of chapter 37 of title 7, regarding seeds, or rules promulgated thereunder);

7 U.S.C. 1642(c) (failing to make a report or keep a record as required by regulations promulgated by the President under the International Wheat Agreement);

7 U.S.C. 3604 (failing to keep information or submit a required report, knowingly submitting a false report, or violating a rule or regulation under the law implementing the 1977 International Sugar Agreement);

12 U.S.C. 1713(b) (violating certification made by mortgagor of affordable rental housing to obtain federal mortgage insurance that he or she will not discriminate against families with children or sell property while mortgage is in effect);

12 U.S.C. 1738(a) (violating certification made by mortgagor to obtain federal mortgage insurance, available under provision for relief of housing shortage for WWII veterans, that he will not discriminate against families with children or sell property while mortgage is in effect);

12 U.S.C. 1750b(a) (violating certification made by mortgagor to obtain federal mortgage insurance for property in area certified by President as a critical defense housing area that he will not discriminate against families with children or sell property while mortgage is in effect);

13 U.S.C. 212 (while serving as an officer or employee of the Census Bureau, neglecting or refusing without justification to perform duties);

13 U.S.C. 223 (while the owner or manager of a hotel, apartment house, boarding or lodging house, tenement, or other building, refusing or willfully neglecting to furnish names of occupants to census or to give free ingress and egress to census employees);

14 U.S.C. 83 (establishing, erecting, or maintaining any aid to maritime navigation in or adjacent to waters subject to

the jurisdiction of the United States without obtaining authority to do so from the Coast Guard);

14 U.S.C. 84 (removing, changing the location of, willfully damaging, making fast to, or interfering with any aid to maritime navigation installed by the Coast Guard);

14 U.S.C. 85 (violating any rule or regulation promulgated by the Coast Guard with respect to the establishment, maintenance and operations of lights and signals on fixed and floating structures);

15 U.S.C. 159 (engaging in business with China under a name in connection with which the legend "Federal Inc. U.S.A." is used);

15 U.S.C. 241 (packing, selling, or offering for sale lime in unmarked barrels, or selling, charging for, or purporting to deliver any less weight of lime than established by law);

15 U.S.C. 330d (knowingly and willfully violating Section 330a of Title 15, which prohibits engaging or attempting to engage in weather modification activities without submitting required reports to the Secretary of Commerce);

15 U.S.C. 1338 (violating laws on cigarette labeling and advertising);

15 U.S.C. 4404(a) (violating laws on warnings and labeling for smokeless tobacco);

16 U.S.C. 373 (causing damage to Hot Springs National Park);

16 U.S.C. 374 (taking, using, or bathing in water of Hot Springs National Park in violation of rules and regulations promulgated by the Secretary of the Interior and without providing evidence of being a patient of a physician authorized to prescribe the waters of the Hot Springs);

16 U.S.C. 422d (destroying monuments in Moores Creek National Battlefield);

16 U.S.C. 423f (destroying monuments in Petersburg National Battlefield);

16 U.S.C. 425g (destroying monuments in Fredericksburg and Spotsylvania County Battle Fields Memorial);

16 U.S.C. 426i (destroying monuments in Stones River National Battlefield);

16 U.S.C. 428i (destroying monuments in Fort Donelson National Battlefield);

16 U.S.C. 430h (destroying monuments in Vicksburg National Military Park);

16 U.S.C. 430i (destroying monuments in Guilford Courthouse National Military Park);

16 U.S.C. 430q (destroying monuments in Monocacy National Battlefield);

16 U.S.C. 460*l*-6a(e) (violating rules and regulations regarding the collection of fees at national parks, military parks, monuments, and seashores);

16 U.S.C. 916e (failing to make, keep, or furnish any catch return record or other report required by the whaling convention or other law or regulation);

18 U.S.C. 154 (1994 & Supp. IV 1998) (while serving as a bankruptcy trustee, purchasing property of bankruptcy estate or knowingly refusing reasonable opportunity for inspection of documents and accounts relating to the estate);

18 U.S.C. 243 (excluding juror on account of race or color);

18 U.S.C. 244 (discriminating against person wearing uniform of armed forces);

18 U.S.C. 291 (while serving as a judge, clerk, or deputy clerk, purchasing for less than full value a claim for the fee, mileage, or expenses of a witness, juror, or officer of the court);

18 U.S.C. 431 (while serving as a member of Congress, making or entering into a contract or agreement for the United States);

18 U.S.C. 475 (imitating an obligation or security of the United States in an advertisement or attaching a notice or advertisement to such an instrument);

18 U.S.C. 489 (making or bringing from a foreign country with intent to sell, give away, or use any token, disk, or device in the likeness of any of the coins of the United States or of any foreign country);

18 U.S.C. 511A (affixing a theft prevention decal to a motor vehicle without authorization);

18 U.S.C. 1694 (while operating a conveyance on a post route, carrying letters or packets otherwise than in the mail);

18 U.S.C. 1697 (while operating a conveyance, knowingly permitting the conveyance of anyone acting as or employed as a private express for the conveyance of letters or packages);

18 U.S.C. 1698 (while in charge of a vessel operating between ports in the United States, failing to deliver to the postmaster within the required time all letters and packages brought by the vessel and not part of the cargo);

18 U.S.C. 1699 (breaking bulk before arranging for the delivery of all letters on board to the nearest post office);

18 U.S.C. 1713 (while serving as an officer or employee of the postal service, issuing a money order before receiving the money therefor);

18 U.S.C. 1719 (making use of any official envelope, label, or indorsement authorized by law to avoid the postage or registry fee for personal mail);

18 U.S.C. 1722 (submitting false evidence to the post office relative to any publication for the purpose of securing the admission thereof at the second-class rate);

18 U.S.C. 1723 (knowingly concealing or inclosing any matter of a higher class mail in that of a lower class and depositing same for the conveyance by mail at a lower rate than would be charged for the material);

18 U.S.C. 1725 (knowingly and willfully depositing mailable matter on which no postage has been paid with intent to avoid the payment of lawful postage thereon);

18 U.S.C. 1729 (setting up or professing to keep a post office without authority from the postal service);

18 U.S.C. 1734 (while an editor or publisher, printing in a publication entered as second class mail editorial or other reading matter for which payment has been made without marking the same "advertisement");

18 U.S.C. 1762 (1994 & Supp. IV 1998) (failing to mark as such packages shipped in interstate commerce containing goods, wares, or merchandise produced wholly or in part by convicts or prisoners, except convicts or prisoners on probation or parole);

18 U.S.C. 2075 (while an officer of the United States, failing to make a return or report required by Congress or a regulation of the Department of Treasury within the time prescribed);

18 U.S.C. 2236 (1994 & Supp. IV 1998) (while serving as an officer, employee, or agent of the United States, searching any private dwelling used as such without a warrant, or maliciously and without reasonable cause searching any other building or property without a search warrant, excepting officers who obtain consent or who are serving a warrant of arrest or arresting or attempting to arrest a person committing or attempting to commit an offense in the officer's presence);

18 U.S.C. 2721-2723 (knowingly violating prohibition on release and use of certain personal information from state motor vehicle records);

18 U.S.C. 3162(b) (while serving as an attorney in a criminal trial, knowingly allowing a case to be set for trial without disclosing fact that material witness will not be available at trial, or filing a motion solely for the purpose of delay, or making a false statement for the purpose of obtaining a continuance, or otherwise willfully failing to proceed to trial without justification);

19 U.S.C. 58b(d) (failure to pay a fee for customs service);

19 U.S.C. 507(a) (neglecting or refusing to assist a customs officer upon proper demand in making any arrest, search, or seizure authorized by a law enforced or administered by customs officers);

21 U.S.C. 16-17 (violating laws prohibiting adulterated or misbranded foods or drugs);

22 U.S.C. 3104(e) (violating regulations governing information on international investments);

25 U.S.C. 202 (inducing an Indian to execute a contract, deed, or mortgage purporting to convey an interest in land held by the United States in trust for the Indian, unless the lease or deed is authorized by law);

26 U.S.C. 7262 (violating occupational tax laws relating to wagering);

26 U.S.C. 7275 (failing to indicate on the ticket or advertisement for a ticket for air travel the amount of the price attributable to port taxes);

27 U.S.C. 207 (violating certain laws regarding the sale of intoxicating liquors);

33 U.S.C. 421 (depositing refuge in or near Lake Michigan in or near Chicago);

33 U.S.C. 495 (failing or refusing to comply with certain orders of the Secretary of Transportation regarding bridges over navigable waters);

33 U.S.C. 502 (willfully failing to comply with a lawful order of the Secretary of Transportation requiring alteration to a bridge that is an unreasonable obstruction of a navigable waterway of the United States);

33 U.S.C. 519 (willfully failing to comply with a lawful order of the Secretary of Transportation regarding a bridge over navigable waters of the United States);

33 U.S.C. 915 (1986) (requiring an employee covered by the Longshore and Harbor Workers' Compensation Act to enter into an invalid agreement to contribute to a benefit fund for the purpose of providing medical services and supplies);

33 U.S.C. 941 (while an employer of persons covered by the Longshore and Harbor Workers' Compensation Act, failing to furnish and maintain reasonably safe places of employment);

38 U.S.C. 7332 (violating section providing for confidentiality of patient records of the Veterans Administration relating to

drug abuse, alcoholism, HIV infection, and sickle cell anemia);

38 U.S.C. 5701(a) (willfully using names of members, dependants, or former members of the Armed Forces for a purpose other than that for which release of the names is authorized);

42 U.S.C. 290dd-2(a) (failing to comply with law providing for the confidentiality of patient records from substance abuse treatment and education programs conducted or assisted by the United States);

42 U.S.C. 1437d(q)(6) (Supp. IV 1998) (knowingly and willfully requesting or obtaining information about an applicant for public housing under false pretenses or knowingly or wilfully disclosing such information to a person not entitled to receive it);

42 U.S.C. 14133(c) (disclosing without authorization or knowingly obtaining without authorization individually identifiable DNA information in a database created or maintained by a federal law enforcement agency);

42 U.S.C. 2277 (while or subsequent to serving in a covered capacity, knowingly communicating restricted data to an unauthorized person relating to the development and control of atomic energy);

42 U.S.C. 3544 (c)(3)(A) (1994 & Supp. IV 1998) (knowingly and willfully requesting or obtaining information about an applicant for or participant in public housing without consent or agreement);

43 U.S.C. 315a (violating law or regulation on the protection, administration, regulation, and improvement of grazing districts);

43 U.S.C. 316k (willfully grazing any class of livestock without authority under a lease or permission on lands in a grazing district in Alaska as designated by the Secretary of the Interior);

46 U.S.C. App. 194 (violating law prohibiting owners of vessels shipping goods to or between ports in the United States from inserting in any bill of lading or shipping document any agreement lessening the obligation of due diligence in operating the vessel or violating law requiring vessel transporting merchandise to or between ports of the United States to issue to shippers a bill of lading or other shipping document);

47 U.S.C. 502 (willfully and knowingly violating any rule, regulation, restriction, or condition made or imposed by the FCC or imposed by an international radio or wire communications treaty);

49 U.S.C. 526 (knowingly and willfully violating certain sections of Title 49, regulating motor carriers, or regulations or orders of the Secretary of Transportation relating thereto);

49 U.S.C. 46309(a) (while acting as an air carrier or employee thereof, knowingly and willfully offering or granting concessions or price rebates to obtain transportation at less than the lawful price, or receiving same).

49 U.S.C. 46316(a) (knowingly and willfully violating air commerce and safety laws or regulations or orders of the

Secretary of Transportation or Administrator of the Federal Aviation Administration with respect to aviation safety duties).

APPENDIX B

Statutes Authorizing Warrantless Arrests for Misdemeanor Offenses

Ala. Code § 15-10-3(a)(1) (1995 & Supp. 1999), revised by 2000 Ala. Acts 266 (authorizing warrantless arrest for any "public offense" committed or breach of the peace threatened in the presence of the officer);

Alaska Stat. § 12.25.030(a)(1) (Michie 1999) (authorizing arrest without a warrant "for a crime committed * * * in the presence of the person making the arrest");

Ariz. Rev. Stat. Ann. § 13-3883(a)(2) (West Supp. 1999) (authorizing arrest without a warrant when a misdemeanor has been committed in the officer's presence);

Ark. Code Ann. § 16-81-106(b)(2)(a) (Michie Supp. 1999) (authorizing arrest by an officer without a warrant "where a public offense is committed in his presence");

Cal. Penal Code § 836(a)(1) (West Supp. 2000) (authorizing warrantless arrest where "the person to be arrested has committed a public offense in the officer's presence");

Colo. Rev. Stat. § 16-3-102(1)(b) (1999) (authorizing officer to make warrantless arrest when "[a]ny crime has been or is being committed" in the officer's presence);

Conn. Gen. Stat. Ann. § 54-1f(a) (1994 & West 2000) (authorizing warrantless arrests for "any offense" when arrestee is taken in the act or on the speedy information of others);

Del. Code Ann. tit. 11, § 1904(a)(1) (1995) (authorizing warrantless arrest for any misdemeanor committed in the officer's presence);

D.C. Code Ann. § 23-581(a)(1)(B) (1996) (authorizing warrantless arrest where officer has probable cause to believe a person has committed an offense in the officer's presence);

Fla. Stat. Ann. § 901.15(1) (West 2000), amended by 2000 Fla. Sess. Law Serv. 00-369 (West) (warrantless arrest allowed if misdemeanor or ordinance violation committed in presence of officer)

Ga. Code Ann. § 17-4-20 (a) (1997) (authorizing warrantless arrest by officer "for a crime * * * if the offense is committed in such officer's presence");

Haw. Rev. Stat. Ann. § 803-5(a) (Michie 1999) (authorizing warrantless arrest "when the officer has probable cause to believe that [a] person has committed any offense");

Idaho Code § 19-603(1) (1997) (authorizing warrantless arrest by officer "[f]or a public offense committed or attempted in his presence");

725 Ill. Comp. Stat. Ann 5/107-2(1)(c) (West 1992) (authorizing arrest by officer without a warrant when "[h]e has reasonable grounds to believe that the person is committing or has committed an offense");

Ind. Code Ann. § 35-33-1-1(a)(4) (Michie 1998) (authorizing warrantless arrest when the officer has probable cause to believe a person "is committing or attempting to commit a misdemeanor in the officer's presence");

Iowa Code Ann. § 804.7(1) (West 1994) (authorizing warrantless arrest "[f]or a public offense committed or attempted in the peace officer's presence");

Kan. Stat. Ann. § 22-2401(d) (Supp. 1999) (authorizing warrantless arrest for "[a]ny crime, except a traffic infraction or a cigarette or tobacco infraction" committed in the officer's view);

Ky. Rev. Stat. Ann. § 431.005(1)(d) (Michie 1999) (authorizing warrantless arrest for any offense punishable by confinement committed in the officer's presence); *id.* § 431.015(2) (officer must issue citation rather than arrest for certain violations);

La. Code Crim. Proc. Ann. art. 213(3) (West 1991) (authorizing warrantless arrest where the officer "has reasonable cause to believe that the person to be arrested has committed an offense");

Me. Rev. Stat. Ann. tit. 15, § 704 (West 1980) (authorizing warrantless arrest of "persons found violating any law of the State or any legal ordinance or bylaw of a town") and *id.* tit. 17-A, § 15(B) (West 1983 & Supp. 1997), amended by 2000 Me. Laws 644, (authorizing warrantless arrests for misdemeanors committed in the officer's presence);

Md. Code Ann. art. 27, § 594B(a) (1996 & Supp. 1999) (authorizing warrantless arrest of any person who commits, or attempts to commit, "any felony or misdemeanor" in the presence of an officer);

Mass. Ann. Laws ch. 276, § 28 (Law. Co-op. 1992 & Supp. 1998) (warrantless arrest authorized for designated misdemeanor offenses); *id.* ch. 272, § 60 (Law. Co-op. 1992)

(authorizing warrantless arrest for littering offenses where identity of arrestee is not known to officer);

Mich. Comp. Laws Ann. § 764.15(a) (West 2000) (officer, without a warrant, may arrest a person if a felony, misdemeanor, or ordinance violation is committed in the officer's presence); *id.* § 780.581 (West 1998) (if the offense is punishable by a fine or by a prison term of not more than one year, the officer must take the person before a magistrate without unnecessary delay or release the person on bond);

Minn. Stat. Ann. § 629.34(c)(1) (West Supp. 2000) (authorizing warrantless arrest "[w]hen a public offense has been committed or attempted in the officer's presence");

Miss. Code Ann. § 99-3-7 (1999 & Supp. 1999) (warrantless arrest allowed for indictable offense committed in presence of officer)[1]; *id.* § 45-3- 21(1)(a)(vi) (1999) (authorizing warrantless arrest by Highway Safety Patrol Officers of "any person or persons committing or attempting to commit any misdemeanor, felony or breach of the peace within their presence or view");

Mo. Ann. Stat. § 479.110 (West 1987) (authorizing warrantless arrest of "any person who commits an offense in [the officer's] presence");

Mont. Code Ann. § 46-6-311(1) (1997) (authorizing warrantless arrest if "the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest");

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[1] This statute applies to misdemeanor offenses. *Butler* v. *State*, 212 So.2d 573 (Miss. 1968).

Neb. Rev. Stat. § 29-404.02(2)(d) (1995) (authorizing warrantless arrest when the officer has probable cause to believe that the person has committed a misdemeanor in the presence of the officer);

Nev. Rev. Stat. § 171.172 (1999) (authorizing warrantless arrest by officer in fresh pursuit of a person who commits "any criminal offense" in the presence of the officer);

N.H. Rev. Stat. Ann. § 614:7 (1986 & Supp. 1999) (authorizing warrantless arrest by officer in fresh pursuit of any person who has committed "any criminal offense" in the presence of the officer); *id.* §§ 594:10(I)(a), 594:14 (officer may arrest without warrant upon probable cause for misdemeanor or violation committed in officer's presence, or may issue summons in lieu of arrest);

N.J. Stat. Ann. § 53:2-1 (West 1986 & Supp. 2000) (authorizing state police to arrest without a warrant "for violations of the law committed in their presence");

N.M. Stat. Ann. § 3-13-2(A)(4)(d) (Michie Supp. 1999) (authorizing officers to "apprehend any person in the act of violating the laws of the state or the ordinances of the municipality and bring him before competent authority for examination and trial."); *id.* § 30-3-6(B) (Michie 1994) (authorizing warrantless arrest for assault, battery, public affray or criminal damage to property); *id.* § 30-16-16(B) (authorizing warrantless arrest for falsely obtaining services or accommodations); *id.* § 30-16-23 (authorizing arrest without warrant of any person officer has probable cause to believe has committed the crime of shoplifting); *id.* § 3-23-3 (Michie Supp. 1999) (warrantless arrests for violations of forest fire laws committed in officer's presence); *id.* § 31-1-7 (authorizing warrantless arrests in cases of do-

mestic disturbance); see also *id.* 31-1-6 (Michie 2000) (officer who arrests a person without a warrant for a petty misdemeanor may offer the person arrested the option of a citation to appear instead of taking him to jail);

N.Y. Crim. Proc. Law § 140.10(1)(a) and (2) (McKinney 1992) (warrantless arrest allowed when officer has probable cause to believe any offense has been committed in his presence and probable cause to believe person to be arrested committed the offense; in the case of petty offenses, authority to arrest is limited to geographical area of officer's employment and county in which such offense was committed or believed to have been committed or in adjoining county);

N.C. Gen. Stat. § 15A-401(b) (1999) (authorizing a warrantless arrest where an officer has probable cause to believe the person has committed "a criminal offense" in the officer's presence and for misdemeanors out of the officers presence in certain circumstances);

N.D. Cent. Code § 29-06-15 (1)(a) (1991) (authorizing warrantless arrest "[f]or a public offense, committed or attempted in the officer's presence");

Ohio Rev. Code Ann. § 2935.03 (Anderson 1999) (authorizing warrantless arrest of a person "found violating * * * a law of this state, an ordinance of a municipal corporation, or a resolution of a township"); but see *id.* § 2935.26 (providing that notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation, except in specified circumstances);

Okla. Stat. Ann. tit. 22, § 196(1) (West 1992 & Supp. 2000), as amended by 2000 Okla. Sess. Laws 370, (authorizing warrantless arrests "[f]or a public offense, committed or attempted in [the officer's] presence");

Or. Rev. Stat. § 133.310(1) (1997) (authorizing warrantless arrest upon probable cause for any offense except unclassified offenses, unless the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class C misdemeanor; authorizing warrantless arrest for any crime occurring in the officer's presence); *id.* § 161.515(1) (a crime is an offense for which a sentence of imprisonment is authorized);

Pa. Stat. Ann. tit. 71, § 252(a) (West 1990) (authorizing warrantless arrests by state police "for all violations of the law, including laws regulating the use of the highways, which they may witness"); *id.* tit. 53, § 37005 (West 1998) (police officers "may, within the city or upon property owned or controlled by the city or by a municipal authority of the city within the Commonwealth, without warrant and upon view, arrest and commit for hearing any and all persons guilty of breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness, or who may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, or violating any of the ordinances of said city for the violation of which a fine or penalty is imposed."); *id.* tit. 13, § 45 (authorizing, without warrant and upon view, "arrest and commitment for hearing of any and all persons guilty of a breach of the peace, vagrancy, riotous or disorderly conduct or drunkenness or may be engaged in the commission of any unlawful act tending to imperil the personal security or endanger the property of the citizens, or violating any ordinances of said

borough, for the violation of which a fine or penalty is imposed.");

R.I. Gen. Laws § 12-7-3 (1994) (authorizing warrantless misdemeanor and petty misdemeanor arrests where "the officer has reasonable ground to believe that [the] person cannot be arrested later or may cause injury to himself or herself or others or loss or damage to property unless immediately arrested");

S.C. Code Ann. § 17-13-30 (Law. Co-op. 1985) (authorizing warrantless arrests of persons who, in the presence of the officer, "violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter");

S.D. Codified Laws § 23A-3-2 (Michie 1998) (authorizing warrantless arrest by officer "[f]or a public offense, other than a petty offense, committed or attempted in his presence");

Tenn. Code Ann. § 40-7-103(a)(1) (1997 & Supp. 1999) (authorizing law enforcement officer to arrest without a warrant "[f]or a public offense committed or a breach of the peace threatened in the officer's presence"); see also *id.* § 40-7-118(b)(1) (1997) ("officer who has arrested a person for the commission of a misdemeanor * * * shall issue a citation to such arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate");

Tex. Code Crim. P. Ann. art. 14.01 (West 1977) (authorizing officer's arrest of offender without a warrant "for any offense committed in his presence or within his view");

Utah Code Ann. § 10-3-915 (1999) (authorizing warrantless arrests for "any offense directly prohibited by the laws of this state or by ordinance"); *id.* § 77-7-2 (authorizing warrantless arrest for any public offense committed in presence of officer or if officer has reasonable cause to believe offense was committed and reasonable cause for believing person may flee, destroy evidence, or injure another);

Vt. R. Crim. P. 3(a) (2000) (authorizing warrantless arrests where officer has probable cause to believe that "a crime" is committed in the presence of the officer); see also *id.* 3(c) ("A law enforcement officer acting without warrant who is authorized to arrest a person for a misdemeanor under subdivision (a) of this rule shall, except as provided in paragraph (2) of this subdivision, issue a citation to appear before a judicial officer in lieu of arrest.");

Va. Code Ann. § 19.2-81 (Michie 1995 & Supp. 1999) (authorizing warrantless arrest of "any person who commits any crime in the presence of [an] officer");

Wash. Rev. Code Ann. § 10.31.100 (West 1990 & Supp. 1999), as amended by 2000 Wash. Laws 119 (authorizing warrantless arrests for misdemeanors committed in the presence of the officer);

W. Va. Code § 62-10-9 (2000) (authorizing warrantless arrests "for all violations of any of the criminal laws of the United States, or of this state, when committed in [an officer's] presence");

Wis. Stat. Ann. § 968.07(1)(D) (West 1998) (authorizing warrantless arrest when "[t]here are reasonable grounds to

believe that the person is committing or has committed a crime");

Wyo. Stat. Ann. § 7-2-102(b)(i) (Michie 1999) (authorizing warrantless arrest when "[a]ny criminal offense" is committed "in the officer's presence").

APPENDIX C

State-Law Limitations on Arrests for Traffic Offenses

The following States require the issuance of a citation in lieu of arrest in some circumstances:

Ala. Code § 32-1-4 (1999) (when any person is arrested for a motor vehicle misdemeanor, the officer shall release upon written bond to appear, unless officer has good cause to believe person has committed any felony, or person charged with offense resulting in injury or death or offense of DWI);

Alaska Stat. § 12.25.180(b) (Michie 1998) (when person is stopped for the commission of a misdemeanor or the violation of a municipal ordinance, person shall be issued citation unless satisfactory evidence of identity not furnished or person refuses to accept citation or give written promise to appear);

Ark. Code Ann. § 27-14-405 (Michie 1994) (authorizing arrests upon view and without warrant for any violation committed in their presence of laws regulating the operation of vehicles or the use of the highways); *id.* § 27-50-601 (procedure prescribed shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade.); *id.* § 27-50-603 (providing for release from custody for traffic offenses on written promise to appear);

Cal. Veh. Code § 40504 (West 1985 & Supp. 2000) (officer must deliver copy of notice to appear to arrested person;

upon promise to appear and identification, the arresting officer shall release the person arrested from custody);

Colo. Rev. Stat. § 42-4-1707 (1999) (for violation of vehicle code punishable as a misdemeanor, petty offense, or misdemeanor traffic offense, other than a violation for which a penalty assessment notice may be issued, officer may issue and serve upon the defendant a summons and complaint); *id.* § 42-4-1712 (provisions of vehicle code shall govern all police officers in making arrests without a warrant or issuing citations for violations of vehicle code, for offenses or infractions committed in their presence, but the procedure prescribed in this article shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense or infraction of like grade);

Fla. Stat. Ann. § 901.15 (West 1996 & Supp. 2000) (authorizing warrantless arrest for misdemeanor committed or ordinance violated in presence of officer); *id.* § 321.05(3)(a) (highway patrol has authority to make arrests while in fresh pursuit of a person believed to have violated the traffic laws); *id.* § 318.14 (specifying that police must issue a citation in lieu of arrest for certain noncriminal traffic infractions);

Haw. Rev. Stat. Ann. § 286-10 (Michie 1998) (upon arresting a person for violation of any provision of the code, officer shall issue to the alleged violator a summons or citation);

Ky. Rev. Stat. Ann. § 431.015(2) (Michie 1999), § 189.290(1) (Michie 1997) (officer must issue citation rather than arrest for certain motor vehicle violations, but exceptions include any one who fails to operate his or her vehicle in a "careful manner, with regard for the safety and convenience of pedestrians and other vehicles upon the highway");

La. Rev. Stat. Ann. § 32:391 (West 1989) (officer shall release on promise to appear person arrested for motor vehicle violation, except in certain situations, for example, if officer has good cause to believe person committed any felony or misdemeanor);

Md. Code Ann. Transp. II § 26-202(a)(2) (1998) (authorizing officer to arrest without warrant for any traffic law violation only if violation committed within officer's presence and person does not furnish satisfactory proof of identify or officer reasonably believes traffic citation will be ignored or in other specified circumstances);

Mich. Comp. Laws Ann. § 764.15(1)(a) (West 2000) (authorizing arrest without a warrant for misdemeanor, or ordinance violation committed in the officer's presence); but see *id.* § 257.907 (West 1990 & Supp. 2000) (certain traffic offenses are civil infractions);

Minn. Stat. Ann. § 169.91 (West 1986 & Supp. 2000) (officer shall issue written notice to appear to person arrested for motor vehicle violation, but must bring person before judge in certain instances, for example, when there is reasonable cause to believe person will leave state);

Neb. Rev. Stat. Ann. §§ 29-427, 29-432, 29-435, 60-684 (Michie 1995) (officer shall issue citation in lieu of arrest for traffic infraction, but can arrest and detain person if, for example, officer believes person will not appear, or will cause immediate harm if not detained, or person has no ties to community);

N.M. Stat. Ann. § 66-2-12(A)(2) (Michie 1998) (authorizing warrantless arrests for motor vehicle code violations committed in the presence of the officer); *id.* § 66-8-123 (officer

must issue summons in lieu of arrest for traffic offense with five exceptions);

N.D. Cent. Code § 39-07-07 (1987 & Supp. 1997) (requires the issuance of a summons in lieu of arrest with some exceptions);

Ohio Rev. Code Ann. § 2935.03 (Anderson 1999) (warrantless arrest allowed if violated state law, municipal ordinance, or township resolution in presence of officer and in jurisdiction in which the officer is appointed, employed, or elected); *id.* § 2935.26 ("Notwithstanding any other provision of the Revised Code, when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation," unless certain circumstances apply);

Okla. Stat. Ann. tit. 22, § 1115.1(A) (West Supp. 2000) (officer shall release on personal recognizance person arrested solely for misdemeanor traffic violation if, among other requirements, officer is satisfied as to person's identify);

Or. Rev. Stat. §§ 133.310(1) (1990 & Supp. 1998), 810.410 (1995 & Supp. 1998) (officer shall not arrest person who commits traffic infraction and may issue citation instead; however, officer can arrest person for specified offense, for example, reckless driving);

R.I. Gen. Laws § 12-7-3 (1994) (warrantless arrest allowed when officer has probable cause to believe misdemeanor committed in his presence and probable cause to believe person to be arrested committed the offense); *id.* § 11-1-2 (offense punishable by fine of not more than $500 is a violation only);

S.C. Code Ann. § 56-25-30 (Law. Co-op. 1991) (officer may release person on own recognizance who has accepted a traffic citation issued by the officer);

S.D. Codified Laws § 32-33-2 (Michie 1998) (citation required whenever violation punishable as misdemeanor);

Tenn. Code Ann. § 40-7-118(b)(1) (1997) (citation in lieu of continued custody for misdemeanor offenses);

Vt. R. Crim. P. 3(a), (c) (officer who has grounds to arrest person for misdemeanor shall issue citation in lieu of arrest, but may arrest in certain specified instances, for example, if person fails to furnish adequate proof of identity, arrest is necessary to obtain nontestimonial evidence, or person has insufficient ties to community);

Va. Code Ann. § 46.2-936 (Michie 1998 & Supp. 1999) (for misdemeanor traffic violations, officer shall issue a summons in lieu of arrest);

Wash. Rev. Code Ann. § 46.64.015 (West 1987 & Supp. 1999) (officer must issue citation in lieu of arrest for traffic offenses except in certain circumstances); *id.* 10.31.100(3) (West 1990 & Supp. 1999) (authorizing warrantless arrests for certain traffic infractions)

Wis. Stat. Ann. §§ 345.22, 345.23 (West 1999) (officer shall release traffic-regulation violator arrested without warrant under certain conditions; otherwise officer has discretion to take violator into custody).

The following States put no statutory limits on police discretion to arrest for traffic offenses:

Ariz. Rev. Stat. Ann. § 13-3883(B) (West Supp. 1999) (officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence);

Conn. Gen. Stat. Ann. § 54-1f(a) (West 1994 & Supp. 2000) (officer may arrest in his precinct for any offense when person taken while committing offense and arrest made upon speedy information of others);

Del. Code Ann. tit. 21, § 701 (1995), as amended by 2000 Delaware Laws Ch. 325 (West) (authorizing warrantless arrest for motor vehicle violations when officer has probable cause to believe violation committed in his presence and probable cause to believe person to be arrested committed the offense);

D.C. Code Ann. § 23-581(a)(1)(B) (1996) (authorizing warrantless arrest where officer has probable cause to believe offense committed in the officer's presence);

Ga. Code Ann. § 17-4-23 (1997) (officer has discretion to give citation or arrest for violation of motor vehicle laws);

Idaho Code § 49-1407 (1994) (officer who stops someone for traffic violation has discretion to give a traffic citation or take arrestee without unnecessary delay before the proper magistrate as specified); *id.* § 19-701A (1997) (officer in fresh pursuit of a person who is reasonably believed by him to have committed, or attempted to commit, any criminal offense or traffic infraction in the presence of the officer,

shall have authority to pursue, arrest and hold in custody or cite such person anywhere in this state);

Ind. Code Ann. §§ 9-26-8-1, 9-26-8-2, 9-30-6-3 (Michie 1997), § 35-33-1-1(a)(3) (Michie 1998) (providing that the procedure prescribed in the motor vehicle chapter is not the exclusive method for the arrest and prosecution of a person for a similar offense; specifying certain offenses under the vehicle code for which officer may arrest without a warrant); *id.* § 9-30-2-5(a) (Michie 1997) (state resident arrested for a misdemeanor regulating the use and operation of motor vehicles, other than the misdemeanor of operating a vehicle while intoxicated, and not immediately taken to court shall be released from custody by the arresting officer upon signing a written promise to appear in the proper court at a time and date indicated on the promise);

Iowa Code Ann. § 804.7 (West 1994) (authorizing arrest for an offense committed in officer's presence or where officer has reasonable grounds to believe a public offense was committed);

Kan. Stat. Ann. §§ 8-2104 (1991), 8-2106 (1991 & Supp. 1999) (officer has discretion to arrest or issue citation for misdemeanor motor vehicle offenses);

Mass. Ann. Laws ch. 90, § 21 (Law. Co-op. 1994) (officer may arrest without warrant and keep in custody for not longer than 24 hours, persons who commit certain motor vehicle offenses);

Miss. Code Ann. § 27-19-133 (1999) (authorizing warrantless arrests for operating any motor vehicle contrary to the provisions of the vehicle code; if vehicle operator is taken into custody, he is entitled to an immediate hearing or to be

released from custody upon giving a good and sufficient bond to appear and answer for the violation);

Mo. Ann. Stat. § 43.195 (West 1992) (state highway patrol may arrest on view, and without a warrant, any person the officer sees violating or who has reasonable grounds to believe has violated any state motor vehicle law);

Mont. Code Ann. § 46-6-311 (1997) (officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest);

Nev. Rev. Stat. Ann. § 484.795 (Michie 1998) (officer who stops someone for a violation of certain traffic laws must bring the arrestee before a magistrate; for other traffic violations, officer has discretion to give a traffic citation or to take arrestee without unnecessary delay before the proper magistrate);

N.H. Rev. Stat. Ann. § 614:7 (1986 & Supp. 1999) (authorizing officer in fresh pursuit of a person who has violated any motor vehicle statute in the presence of the officer to arrest and hold in custody the person anywhere in this state);

N.J. Stat. Ann. § 39:5-25 (West 1990 & Supp. 2000) (officer may arrest without warrant any person committing motor vehicle violation in officer's presence, and may issue summons instead of arresting);

N.Y. Crim. Proc. Law § 140.10 (McKinney 1992) (warrantless arrest allowed when officer has probable cause to believe any offense has been committed in his presence and probable cause to believe person to be arrested committed the

offense; in the case of petty offenses, arrest within the geographical area of such officer's employment and must be made in the county in which such offense was committed or believed to have been committed or in an adjoining county); N.Y. Veh. & Traf. Law § 155 (McKinney 1996) ("For purposes of arrest without a warrant, pursuant to article one hundred forty of the criminal procedure law, a traffic infraction shall be deemed an offense.");

N.C. Gen. Stat. § 20-183(a) (1999) (officer has power to arrest on sight any person found violating motor vehicle laws);

Pa. Stat. Ann. tit. 71, § 252 (West 1990); 75 Pa. Cons. Stat. Ann. § 6304 (West 1996) (state police officer may arrest anyone, and any other police officer may arrest nonresident, for any violation of vehicle code committed in presence);

Tex. Transp. Code Ann. § 543.001 (West 1999) (any officer may arrest without warrant a person found committing a violation of the rules of the road subtitle of the vehicle code);

Utah Code Ann. § 41-3-105(8)(a) (1998 & Supp. 2000) (officers have authority to make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of the motor vehicles law);

W. Va. Code § 15-5-18 (2000) (warrantless arrest allowed for misdemeanor or ordinance violation in presence of officer);

Wyo. Stat. Ann. §§ 31-5-1204 to 31-5-1205 (Michie 1999) (officer may arrest upon reasonable and probable grounds to believe person has committed certain specified motor vehicle violations, including reckless driving).

Supreme Court, U.S.
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No. 99-1408

In The
Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS AS NEXT FRIEND OF ANYA SAVANNAH HAAS AND MACKINLEY XAVIER HAAS,
Petitioners,

vs.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF NEITHER PARTY.

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This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioners and Respondents. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.[1]

INTEREST OF *AMICUS CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the law enforcement function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 110 times in the Supreme Court of the United States and over 40 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California,

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[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored and edited for the *amicus* by James P. Manak, Esq., counsel of record, and Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc. Bernard J. Farber, Esq., Research Attorney, Americans for Effective Law Enforcement, Inc., contributed to the editing of the brief. No other persons authored or edited this brief. Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this brief, without financial support from any source, directly or indirectly.

Illinois, Ohio, and Missouri.

Amicus is an educational organization representing the interests of law enforcement at the national, state, and local levels. Our constituents include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of making arrests within the bounds of the law; and (2) legal advisors who are called upon to advise law enforcement officers and police and municipal administrators in connection with such matters, including the formulation and implementation of policy on the subject of arrests for minor offenses and traffic infractions.

AELE maintains an independent posture and will support only those law enforcement activities that conform to constitutional requirements and good practice. For example, in *Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992), we supported a prison inmate who sued correctional officers, arguing that recognition of his claim would discourage the use of minor, but excessive, force by law enforcement and correctional officers.

STATEMENT OF THE CASE

The petitioner, Gail Atwater, was stopped by a police officer for failure to have her children seat belted in her vehicle. Police officers in Texas, as in other states, ordinarily issue tickets after stopping motorists for traffic violations. Tex. Transp. Code Ann. §§ 543.003-.005 (West 1999).

Rather than doing this, the officer took the

extraordinary step of placing petitioner under full custodial arrest. He handcuffed her with her hands behind her back, placed her in his squad car, and took her to the police station. At the police station, she was forced to remove her shoes, jewelry, and glasses and empty her pockets. Petitioner's "mug shot" was taken, and she was placed in a jail cell for approximately one hour until being taken before a magistrate. Ultimately she pled no contest to the seat belt violation and paid the maximum penalty for this violation—a fifty dollar fine. Additional charges of driving without a license and proof of insurance were dismissed.

Petitioners filed suit in state court against the city of Lago Vista, the police officer, and the chief of police, for damages arising from her incarceration. The city removed the suit to the United States District Court for the Western District of Texas, which granted summary judgment for the city. The district court ruled that petitioners had not identified a constitutional right that had been violated by the custodial arrest.

The United States Court of Appeals for the Fifth Circuit, three judge panel, reversed the summary judgment with respect to the Fourth Amendment claim, holding that petitioner had established that the custodial arrest for not wearing a seat belt violated a clearly-established Fourth Amendment right. The remainder of the district court's judgment was affirmed. *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999).

The Fifth Circuit granted rehearing *en banc* and vacated the panel's decision. A majority affirmed the district court's judgment, holding that the custodial arrest did not violate petitioner's Fourth Amendment rights because the officer had probable cause and the

arrest was not conducted in an unreasonable manner. The court did not consider the issue of whether a full custodial arrest for a minor offense was proper under the common law as subsumed into the Fourth Amendment, nor did it balance the city's interest in enforcing the seat belt law against the extent of the governmental intrusion to test the reasonableness of using a full custodial arrest. Six judges dissented. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (*en banc*).

This Court granted certiorari on the question: Does Fourth Amendment limit use of custodial arrests for fine-only *traffic offenses? Atwater v. City of Lago Vista*, 120 S. Ct. 2715 (2000).

SUMMARY OF ARGUMENT

Amicus takes the position, as we did in our *amicus* brief in *Ricci v. Village of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), *cert. granted*, 522 U.S. 1038, *cert. dismissed as improvidently granted*, 523 U.S. 613, 118 S. Ct. 679, 139 L. Ed. 2d 627 (1998), that a citation procedure, rather than a full custodial arrest, in situations such as presented by this case, fully comports with the reasonableness requirements of the Fourth Amendment and is the preferred means of processing such a case. This question should depend upon a number of factors presented by a particular case, whether it be a traffic case or a non-traffic case. Model codes have adopted and encouraged such citation procedures as alternatives to summary arrests for minor offenses and some states have adopted statutes on the subject incorporating various features of the codes. This Court should encourage the continuation of this process of modernizing the law of the states on the subject of arrests for minor offenses to comport with

reasonableness requirements and best practices.

ARGUMENT

OFFICERS SHOULD BE REQUIRED TO USE A CITATION WHEN THEY ENFORCE PETTY OFFENSES, INCLUDING TRAFFIC OFFENSES, UNLESS THERE ARE CIRCUMSTANCES WHICH SUGGEST THAT A CUSTODIAL ARREST IS NECESSARY.

To put the matter in practical perspective, one might consider the petty offense committed by petitioner. As pointed out by Professor Timothy P. O'Neill, John Marshall Law School (Chicago): "Consider the number of minor traffic violations that the typical driver makes each time he or she gets into a car." O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. Colo. L. Rev. 693 (Summer, 1998). Every motorist "will commit a traffic offense sometime." Comment, Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 Tulane L. Rev. 1409, 1727 (March, 2000). *See also*, Sulken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221 (1993); Knight, *The Realities of Racial Profiling: Broad interpretations of High Court decisions lead to Fourth Amendment abuses*, 15 Criminal Justice 22 (Summer 2000).

Rare indeed is the person who drives a vehicle or walks in the street who will not be faced someday with a traffic stop, as was the petitioner, although hopefully with different results.

The majority opinion choose not to consider the underlying common law issue. But this Court can do so. As noted in *State v. Jones*, 88 Ohio St. 2d 430, 727 N.E.2d 886, 893 (2000), common law criminal offenses were classified into three categories: treason, felonies, and misdemeanors. 1 LaFave & Scott, *Substantive Criminal Law* (1986) 41, Section 1.6, fn. 1. Many crimes that are classified as felonies under modern federal and state law were classified as misdemeanors at common law, *e.g.*, assault with intent to rob, murder, rape, false imprisonment, kidnaping, and forcible and violent entry.

At common law, officers could make an arrest without a warrant only for offenses classified as felonies and for misdemeanors constituting a breach of the peace committed in the officer's presence. *Carroll v. United States*, 267 U.S. 132, 156-157, 45 S. Ct. 280, 286, 69 L. Ed. 543, 553 (1925). Offenses involving conduct that destroyed or menaced public order and tranquillity such as "violent acts . . . and words likely to produce violence in others," were considered breaches of the peace at common law. *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 905, 84 L. Ed. 1213, 1220 (1940).

It is not likely that offenses classified as minor offenses today, including non-felony traffic offenses, would have been considered breaches of the peace at common law, because offenses classified today as minor are those that society considers to be the least serious. Officers at common law would probably not have been permitted to arrest, at least without a warrant, persons committing offenses similar to the Texas statute involved in this case, unless there were extenuating circumstances. Nevertheless, as noted by the Ohio Supreme Court, *Jones*, 727 N.E.2d at 893, because it is not certain that there was a clear practice forbidding such arrests, a balancing of

the governmental interest with the individual's interest is necessary, a balancing that at least in part has been done by the legislature in some states, as, for example, the Ohio statute on arrests for minor offences (Ohio Rev. Code 2935.26) (the Ohio court found a full custodial arrest for jaywalking violative of the Fourth Amendment and the statute).

Amicus submits, however, that the decision to make a custodial arrest for a minor offense should not be predetermined by a *per se* rule, whether based on a statute or a municipal policy (as was purportedly involved in *Ricci*). *See e.g., People v. Scalisi*, 324 Ill. 131, 154 N.E. 715 (1926); *Commonwealth v. Wright*, 158 Mass. 149, 33 N.E. 82 (1893); *Kennedy v. State*, 139 Miss. 579, 104 So. 449 (1925); *Commonwealth v. Leet*, 537 Pa. 89, 641 A.2d 299 (1994).

Relatively few states have retained the common law rule that such an arrest can be made without a warrant only where a breach of the peace has taken place in the presence of the arresting officer, Note, *Arrest Without a Warrant in New England*, 40 B.U.L. Rev. 58, 71-73 (1960); LaFave, *Search and Seizure*, § 5.1(b), 13 (3d ed. 1995), and many statutes reflect a legislative design calling for a balancing of interests (*e.g.*, Ohio Rev. Code 2935.26). *See* Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 777-84 (1993).

Amicus takes no position on whether the common law rule is necessarily subsumed by the Fourth Amendment Reasonableness Clause, as this Court decided in *Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995), in the context of the knock and announce requirement. But we do note that the Court has wisely eschewed the adoption of inflexible, so-

called "bright line" rules, in favor of objective reasonableness based upon the totality of the circumstances. *See, e.g., Wilson v. Arkansas; Whren v. United States,* 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996); *Ohio v. Robinette,* 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996); *Maryland v. Wilson,* 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997); *Richards v. Wisconsin,* 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997).

Model code development has supported this trend, and in doing so has clearly opted for a non-summary arrest procedure unless extenuating circumstances dictate a summary arrest.

For example, the Model Code of Pre-Arraignment Procedure (ALI: 1975) adopts the position in § 120.1(1), that an officer may arrest for a misdemeanor without a warrant if he has reasonable cause to believe that the person committed it in his presence or merely if he has reasonable cause to believe that the person committed it, but in the latter instance it is also required that "the officer has reasonable cause to believe that such person (i) will not be apprehended unless immediately arrested; or (ii) may cause injury to himself or others or damage to property unless immediately arrested."

The code goes on to provide a procedure for the use of a citation in lieu of an arrest without a warrant:

> Section 120.2. Citation in Lieu of or in Connection with Arrest Without a Warrant
>
> (1) Citation Without Arrest. A law enforcement officer acting without a warrant who has reasonable cause to believe that a person has committed an offense may, subject to the regulations to be issued pursuant to Subsection (4) of this Section,

> issue a citation to such person to appear in court in lieu of arresting him.
>
> (2) Citation After Arrest. A law enforcement officer who has arrested a person without a warrant may, subject to the regulations to be issued pursuant to Subsection (4) of this Section, issue a citation to such person to appear in court in lieu of taking him to a police station as provided in Section 120.9.
>
> (3) Procedure for Issuing Citations. In issuing a citation hereunder the officer shall proceed as follows:
>
> (a) He shall prepare a written citation to appear in court, containing the name and address of the cited person and the offense for which the citation is issued, and stating when the person shall appear in court. Unless the person requests an earlier date, the time specified in the citation to appear shall be at least three days after the issuance of the citation.
>
> (b) One copy of the citation to appear shall be delivered to the person cited, and such person shall sign a duplicate written citation which shall be retained by the officer.
>
> (c) The officer shall thereupon release the cited person from any custody.
>
> (d) As soon as practicable, one copy of the citation shall be filed with the court specified therein, and one copy shall be delivered to the prosecuting attorney.
>
> At least 24 hours before the time set in the citation for the cited person to appear, the prosecuting attorney, or other person authorized by law to issue a complaint for the particular offense, shall either issue and file a complaint charging such person with an offense, or file with the court and deliver to

such person a notice that a complaint has been refused and that such person is released from his obligation to appear. [Any person who wilfully violates a citation to appear in court hereunder is guilty of a misdemeanor.]

Model Code of Pre-Arraignment Procedure (ALI: 1975). *Also see* § 130.2(1)(b), and the Commentary thereto, p. 338, *et seq.*

A similar approach is found in the Uniform Acts, Rules of Criminal Procedure, Procedures Before Appearance (Approved Draft 1974), Rules 211, 221, 222, and the ABA Standards, Pre-trial Release, 1.1., 2.2(c)ii (Approved Draft 1968).

As noted by the court in *State v. Jones*:

> The United States Supreme Court has not addressed the issue of whether a full custodial arrest for a minor offense is, in some circumstances, an unreasonable seizure. However, Justice Stewart suggested that it was an unreasonable seizure in his concurring opinion in *Gustafson v. Florida, supra*, 414 U.S. at 266, 94 S. Ct. at 492, 38 L. Ed. 2d at 462. In *Gustafson*, a police officer arrested Gustafson for failure to have his driver's license in his possession while driving. While searching Gustafson incident to that arrest, the officer discovered marijuana cigarettes.
>
> The court rejected Gustafson's argument that a full-scale body search incident to an arrest for a traffic violation violated the Fourth Amendment. Gustafson did not argue that the *arrest* itself was unconstitutional. In his concurring opinion, Justice Stewart stated that "a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." *Id.* at 266-267, 94 S. Ct. at 492, 38 L. Ed. 2d at 462. This statement clearly adds support to our decision in the instant case [that the custodial arrest of the defendant for jaywalking, which was a subterfuge for searching him as a suspected drug offender, violated both constitutional and statutory rights].

State v. Jones, 88 Ohio St. 2d 430, 727 N.E.2d at 895.

The point we wish to underscore is simply that a police officer's decision whether to make a summary arrest for a minor offense, traffic or otherwise, should depend upon many factors—whether embodied in a statute or a department policy—including such things as:

(1) Whether the offense involves a matter of public safety, including a breach of the peace or threatening behavior;

(2) Whether the offender is known and verifiable;

(3) Whether non-testimonial evidence is needed, such as a driver's blood alcohol concentration;

(4) Whether the offender is a resident of the area;

(5) Whether the offender is likely to repeat or continue his or her law violations unless summarily arrested (*e.g.*, disruptive demonstrations involving "civil disobedience," trespass, or the blocking of access to businesses or public facilities);

(6) Whether the offender has a history of failing to respond to citations and summonses;

(7) Whether the offender may be in need of medical assistance or may be in a predicament where the officer may have a civil duty to protect the offender (*e.g.*, a pedestrian on a busy highway or in a dangerous neighborhood), etc.;

(8) Whether the officer may have a community caretaking function to perform in connection with an

offender, (*e.g.*, preserving the offender's property, safeguarding unattended children, etc.).

Amicus does not propose this list as exhaustive, and refers the Court to the several factors listed in the model codes and their commentaries. We note as well, that in applying a list of factors in such situations, there is a danger, as we said in our *amicus* brief in *Ricci*, p. 10, that the homeless and other disadvantaged persons are less likely to qualify for a citation or immediate release. Legislatures and the courts must be sensitive to this problem.

Police administrators should also be mindful of this concern when they adopt written policies and design training programs; and, indeed, the problem of racial profiling in traffic stops must also be addressed in these materials. *See*, U.S. Dept. of Justice publication, *Traffic Stop Data Collection Policies for State Police, 1999*, a BJS Fact Sheet, National Criminal Justice Reference Service (NCJRS) (Rockville, Maryland), which provides a snapshot, based on a national survey, of the demographic characteristics of drivers and passengers stopped by state police, as well as the traffic-related circumstances under which the stops were made. NCJ-180776, February 2000; and Americans for Effective Law Enforcement, *Specimen Directive on Traffic Stops (and profiling)* at <http://www.aele.org/traffic.html> .

Our point, however, is simply that a per se rule on the subject before the Court is not required by the Fourth Amendment Reasonableness Clause nor desirable from a judicial policy standpoint. *Wilson v. Arkansas; Whren; Robinette; Maryland v. Wilson; Richards; supra.* We believe the states should be encouraged to adopt flexible procedures for such arrests within the parameters of

objective reasonableness, using the model codes as examples and existing state statutes incorporating various code features as models. We would not tie the hands of police and prosecutors in exercising reasonable discretion in weighing relevant factors in making the decision whether an arrest warrant, summons, or a summary arrest is the preferred choice in a particular case.

The real vice in the present case is the officer's use of a summary arrest for a simple traffic violation, when the most cursory balancing of interests would have indicated that a summary arrest was not necessary. The violation of the traffic law by petitioner was open and notorious and involved no breach of the peace or danger to the public. It could be inferred that the officer had some "special agenda" in mind for the petitioner to make a completely unnecessary summary arrest, allegedly verbally abusing her, handcuffing her, locking her up, etc. (an otherwise law-abiding motorist's worst nightmare). It is in part this kind of arbitrary action that impels *amicus* to urge this Court to place restraining limits on the police in making warrantless arrests for minor offenses and infractions.

As law enforcement administrators and legal advisors, AELE believes that reaching the issues that were not resolved in *Gustafson* and *Ricci* and reversing the court below will hasten the adoption of flexible and reasonable statutes and policies on the subject of warrantless arrests for minor offenses. Such a decision will further the adoption of progressive statutes and law enforcement policies on the subject for the benefit of all our citizens, and will at the same time advance the cause of effective law enforcement.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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In The

Supreme Court of the United States

GAIL ATWATER, Individually, and MICHAEL HAAS as next friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK and FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas non-profit corporation with a membership of more than 2000 attorneys covering the State of Texas. TCDLA was organized almost three decades ago with the stated purposes of protecting and ensuring by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases, to resist efforts to curtail such rights, to encourage cooperation between lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and through such cooperation, education and assistance to promote justice and the common good.

STATEMENT

Amicus adopts petitioners' statement.

SUMMARY OF ARGUMENT

A full custodial arrest for a traffic citation is unreasonable under the Fourth Amendment for two reasons. First, the common law at the time of the adoption of the Fourth Amendment did not support a full custodial arrest for fine-only offenses such as those used to regulate our

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court in accordance with SUP. CT. R. 37.3. Pursuant to SUP. CT. R. 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

highways.[2] Second, through a balancing analysis it is easily seen that the interests of the individual impacted by a full custodial arrest far outweigh the state's interest in having one where a licensed driver is a resident, can be sufficiently identified, and is willing to sign a promise to appear. Even in light of the language of *Whren v. United States*, 517 U.S. 806, 816-18 (1996), stating that ordinarily a balancing analysis is not appropriate where probable

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[2] This Court has undertaken two basic methods for analyzing searches and seizures under the Fourth Amendment. The Court has examined the common law in effect at the time the Fourth Amendment was framed, *see, e.g., Wilson v. Arkansas*, 514 U.S. 927 (1995); *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Carroll v. United States*, 267 U.S. 132 (1925), and sometimes the development of the common law since. *See, e.g., Payton*, 445 U.S. at 591 n.33; *Watson*, 423 U.S. at 419-22. The Court has also conducted a balancing analysis, weighing the states's law enforcement interests against the individual's interests in light of the intrusion and whether or not the intrusion advances the state's interests enough to justify it. *See, e.g., Maryland v. Wilson*, 519 U.S. 408 (1997); *Tennessee v. Garner*, 471 U.S. 1(1985); *Winston v. Lee*, 470 U.S. 753 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Camara v. Municipal Court*, 387 U.S. 523 (1967). To a lesser extent, the Court has also examined the acceptance of a law or practice among the ..ites, *see, e.g., Garner*, 471 U.S. at 15-18; *Payton*, 445 U.S. at 598-600; *Watson*, 423 U.S. at 419, and Congress, *see, e.g., Payton*, 445 U.S. at 601; *Watson*, 423 U.S. at 415-16, 423.

This Brief presents a balancing analysis. It is believed that Petitioner will present a thorough and complete analysis under the common law and *Amicus* expressly adopts and agrees with that analysis. In keeping with Sup. Ct. R. 37.1, however, *Amicus* presents no argument thereon.

cause exists, a balancing analysis is appropriate in this case because this arrest was "extreme." *See id.* at 818. The arrest is extreme because it does absolutely nothing to further the state's interests.

Where traffic violations are concerned, in the majority of states the officer has a choice of whether to have the driver sign a promise to appear or to affect a full custodial arrest. Ordinarily, traffic citations carry only a fine as the maximum punishment. Both of these aspects of traffic offenses – officer discretion to arrest and only a fine as punishment – are indicative of the state's reduced interest in custody on traffic citations. The paramount state's interest in affecting a full custodial arrest on any offense is to ensure that the defendant will appear in court. Where a driver is licensed, is a resident who can be reasonably identified by the officer, and is willing to sign a promise to appear, the state's interest in ensuring that the driver will appear in court is satisfied. That interest cannot be additionally furthered through a custodial arrest sufficiently to justify such an increased seizure. Nor can any other state's interests justify a full custodial arrest. This is due in part to other pronouncements from this Court giving police officers the power to control and investigate persons in an automobile as well as the automobile itself. Because the difference in magnitude between a stop and a full custodial arrest is so large, the fact that this additional step does virtually nothing to further the state's interest in ensuring the driver's appearance in court makes this seizure "extreme" such that a balancing analysis is appropriate. *See id.*

The statutes giving police officers the authority to arrest for traffic citations are not "facially" unconstitutional, but only as applied in this case. *See Tennessee v.*

Garner, 471 U.S. 1, 11 (1985). Thus, two possible frameworks for applying them in a constitutional manner are presented at the end of this brief – an "articulable reasons for custody" rule based upon the type of analysis found in *Terry v. Ohio*, 392 U.S. 1, 21 (1968) and a "bright-line rule with exceptions" analysis such as that found in *Tennessee v. Garner*. *See id.* at 11-12.

ARGUMENT

I.

IN ADDITION TO IMPLEMENTING THE COMMON LAW RULE ON MISDEMEANOR ARRESTS, THIS COURT SHOULD PERFORM A FOURTH AMENDMENT BALANCING ANALYSIS

This Court has time and time again recognized that where the constitutionality of a seizure is concerned, the Court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983) and citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *see also Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Winston v. Lee*, 470 U.S. 753, 758-63 (1985); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967). The intrusion, also, must actually further the government's stated interests. *See Garner*, 471 U.S. at 10; *Prouse*, 440 U.S. at 661; *Forrester v. City of San Diego*, 25 F.3d 804, 814 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). This balancing has been said to be inherent in the analysis of whether a seizure is "reasonable." *See Mimms*, 434 U.S. at 108-09 ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' ") (quoting *Terry*, 392 U.S. at 19; *Brignoni-Ponce*, 422 U.S. at 878). The "overriding function of the Fourth Amendment," this Court has said elsewhere, "is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966).

The first issue that must be resolved, however, is whether a balancing analysis even applies to this case because, admittedly, Officer Turek had probable cause to arrest Gail Atwater for the seatbelt violation. *See Whren v. United States*, 517 U.S. 806, 816-18 (1996). Where probable cause exists, this Court held in *Whren*, "[T]he only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests. . . . " *Id.* at 818. *Amicus* would suggest that this is just such a case and that a balancing analysis can and should be undertaken.

First of all, the probable cause existed here, as did the power to arrest, because they were established by Texas statutory law. *See* TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999) (arrest without warrant authorized) & § 545.413

(Vernon 1999) (it is an offense not to wear a seatbelt). No state law should be insulated from constitutional review by this Court merely because it purports to justify a particular type of seizure by probable cause also created by that law. Probable cause should not operate to "immunize a constitutional violation." *Atwater v. City of Lago Vista*, 195 F.3d 242, 247 (5th Cir. 1999) (Garza, J., dissenting), *cert. granted*, 120 S.Ct. 2715 (2000).

Secondly, the type of seizure found in this case *is* extraordinary. It is extraordinary because the seizure cannot be said to further any legitimate law enforcement interest. Where a resident driver is stopped for a fine-only traffic offense and the officer confirms the driver's identity and the driver is willing to sign the citation thereby agreeing to appear in court on the offense, a custodial arrest can do nothing more to further the State's interests *as they pertain to that violation*. And even if it can be argued that some governmental interest is forwarded in some marginal way, this still cannot justify the massive additional step between issuing a citation and conducting a full custodial arrest. Bearing in mind that the probable cause is based solely upon a fine-only traffic code violation, a full custodial arrest in the vast majority of cases is simply too extreme. Whether or not the custodial arrest itself is "conducted in an extraordinary manner," *Whren*, 517 U.S. at 818, the *fact* of the custodial arrest in this context is itself extraordinary. This Court should therefore conduct a balancing analysis under the Fourth Amendment.

A. The Effect On The Interests of the Individual In An Arrest Versus A Citation is Profound.

This Court has rightly recognized that an arrest is a most serious intrusion upon one's privacy as well as the rights contemplated by the framers of the Fourth Amendment. In *United States v. Dionisio*, 410 U.S. 1 (1973), this Court observed that an arrest "is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and . . . results in a record involving social stigma." *Id.* at 10 (quoting *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973)). In another case, this Court stated, "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). In *United States v. Watson*, 423 U.S. 411 (1976), Justice Powell opined, "An arrest . . . is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, . . . no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred." *See id.* at 428 (Powell, J., concurring).

The commentators are in agreement with the Court on the nature of the invasion that goes along with a full custodial arrest. One commentator has observed the arrest in these terms:

> Any arrest has a profound and long-lasting effect on the arrestee. Even if an arrest is for a

minor offense, and charges against the arrestee are ultimately dropped or the arrestee is acquitted, the records of the arrest probably will be retained and disseminated. Moreover, widespread public feeling that "where there's smoke, there's fire" often leaves a cloud of suspicion hanging over an arrestee even if no conviction follows. . . .

A custodial arrest is an especially "awesome and frightening" experience. The arrestee is abruptly constrained and usually searched, even if the arrest is for a minor offense. He is then forcibly taken to an unfamiliar place, booked, fingerprinted, photographed, searched more extensively, and held in jail, possibly under unsanitary and unsafe conditions, until, and unless, he can obtain his release. The arrestee may suffer emotional distress and public humiliation, and may lose contact with family and friends. He may lose time from work and will probably be required to obtain an attorney and spend money on bail. If the detention is at all prolonged, he may lose his job or suffer other adverse consequences.

> If a person charged with a misdemeanor is subjected to a custodial arrest, that arrest is likely to be the major consequence suffered by that person.

William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 797-800 (1993); *see also* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 264 (1989) ("In a society in which freedom and independence are valued, arrest is the greatest of indignities."). Professor Salken said the following about custodial arrests:

> The physical restraint on freedom is not all that an arrested person suffers. Personal privacy is also violated. A person arrested is booked; a record is made of the arrest, usually including fingerprints and sometimes photographs. The record may be permanent, whether or not the individual is ultimately convicted of the offense for which he or she is charged. The arrestee will certainly be searched. Although the search may be limited to a frisk, it is nonetheless more than a "petty indignity" as "the officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin . . . , and entire surface of the legs down to the feet." Probably a more extensive search will be conducted. In addition to a search of the person's body, the police may look in pockets, in any containers that may be in those pockets, and in a purse or briefcase. The search of a traffic offender will extend to the person's car and anything inside the car. The intrusion on privacy is complete.

Salken, *supra*, at 264 (citations omitted).

As jail time is not even in the range of punishment, the custodial arrest will most assuredly be the "major consequence" for persons like Gail Atwater. In Tarrant County, Texas, for instance, it may at present take several hours to book in and out of jail. *See* Fort Worth Star-Telegram, November 4, 1998, "Jail Stealing Their Time, Officers Say," at B1 (reporting book-in delays as long as two hours). The fact is that one can easily stay in jail overnight on an arrest, even when every part of the system (bonding, etc.) works perfectly. And to the extent that Professor Schroeder's portrayal of the arrest and its effects may seem hyperbolic to persons who work within

or are familiar with the criminal justice system, it is a safe bet that it is an accurate depiction of what somebody in Gail Atwater's shoes might very well think and feel at the time the officer tells her she is under arrest.

B. Where The Driver is a Resident Who Is Willing To Sign A Promise To Appear And The Officer Can Reasonably Ascertain His Identity, The State's Law Enforcement Interests Are Not Any More Furthered By A Custodial Arrest Than By A Citation.

Balanced against these personal interests are the state's interests. As in other states,[3] in Texas, the vast majority of regulatory traffic offenses and automobile

[3] At least twenty-eight states have statutes that, like Texas, give the officer on the street either virtually or absolutely unlimited discretion in deciding whether to issue a citation to a traffic violator or affect a full custodial arrest. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMPLE L. REV. 221, 249-52 (1989) (listing all of the states in two categories – unlimited discretion (28 states) and some limits on discretion (22 states)). This Court has observed, however, "that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). The same is no doubt true of acts of states, and in fact on several occasions this Court has struck down the laws of many states at once when it was determined that those laws violated the Fourth Amendment. In *Payton v. New York*, 455 U.S. 573, 598-99 (1980), for example, this Court declared unconstitutional the current practices of twenty-four states that permitted the type of warrantless home arrests examined in that case. Some twenty states at the time permitted the use of deadly force on fleeing felons that was declared unconstitutional in *Tennessee v. Garner*, 471 U.S. 1, 15-18 (1985). *See also Knowles v. Iowa*, 525 U.S. 113, 116 (1998) ("The question we therefore address is whether the search at issue, authorized as it was by state law, nonetheless violates the Fourth Amendment.").

equipment violations are fine-only (not less than $1 nor more than $200) misdemeanors. *See* TEX. TRANSP. CODE ANN. § 542.401 (Vernon 1999). This is a reflection of the legislature's opinion of the severity of the offenses. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). In *Welsh*, this Court noted that the grade of the offense (driving while intoxicated, a fine-only regulatory offense in Wisconsin) could not justify a warrantless home arrest. *See id.* The following observations, made by the Court in *Welsh*, are quite relevant to this case:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.

Welsh, 466 U.S. 754. Of course we are not here examining a warrantless arrest in the home, which will receive more scrutiny than a warrantless arrest in public. *Compare Payton v. New York*, 445 U.S. 573, 586-87 (1980) (warrantless arrests in the home) *with United States v. Watson*, 423 U.S. 411, 423 (1976) (warrantless arrests in public). But we are also not here examining an arrest for the offense of driving while intoxicated, an offense which is obviously much more hazardous to the public than the failure to wear a seatbelt (punishable in Texas by a fine of not less than $25.00 and not more than $50.00). *See* TEX. TRANSP. CODE ANN. § 545.413(d) (Vernon 1999).

It would be quite a stretch indeed to characterize the act of driving without one's seatbelt fastened as a "breach of the peace" or a "continuous danger." Nonetheless, in every case a police officer may, at his sole discretion, affect a full custodial arrest. *See* TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999). What are a State's interests in her police officers having the discretionary power to effect a full custodial arrest for a fine-only traffic offense where the driver's identity is known and he is willing to sign an agreement to appear in court?

1. The State's Interest in Fixing the Identity of the Offender and Ensuring That He Will Appear in Court Cannot Support a Full Custodial Arrest For a Fine-Only Traffic Violation.

The government no doubt has an interest in fixing the identity of a defendant and ensuring that he will appear in court to answer the charges against him. By many accounts, this is the number one reason for arrest. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) ("The purpose of an arrest at common law, in both criminal and civil cases, was 'only to compel an appearance in court'. . . .); Schroeder, *supra*, at 834 ("In the course of the last century, arrest has come to be viewed primarily as a means of making the arrestee available to answer a charge or accusation against him."); Salken, *supra*, at 266 ("The government's interest in insuring the defendant's presence at the trial is strong and legitimate."); Horace L. Wilgus, *Arrest Without A Warrant*, (pt. 1), 22 MICH. L. REV. 541, 543 (1924) (arrest defined as "the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime"); 4 WILLIAM BLACKSTONE,

COMMENTARIES ON THE LAWS OF ENGLAND *286 (central purpose of arrest is to ensure suspect's presence at trial). Custodial arrest is certainly a means by which this is accomplished. When a person is arrested and booked, there can be no doubt that in the vast majority of cases, the true identity of the defendant is fixed and he is keenly aware that he needs to appear in court.

When a police officer pulls a driver over for a traffic violation, he asks for the driver's license. He invariably then goes back to his car and runs a computer check on the license to see whether it is valid and whether it is clear of warrants. If he does not have the ability to do this in his car, he radios the station, where someone does it for him. If the driver's license is clear and in good order, the police officer knows exactly who he is dealing with (due in no small part to the fact that the license has a picture on it). The driver's identification is "fixed." Upon issuance of a citation, along with the driver's signature indicating that he or she will appear in court, the criminal process has begun. There simply is nothing further to be done to ensure that the driver will appear that could justify the quantum leap in invasiveness between a citation and a full custodial arrest. Further, if the driver thereafter fails to show up for court, then a warrant is issued for his arrest for failing to appear. *See* TEX. TRANSP. CODE ANN. § 543.009(b) (Vernon 1999). Thus, there can be no credible argument that drivers can just ignore traffic tickets and they will go away.

This Court has observed on several occasions that it will consider the extent to which the particular seizure at hand furthers the government's claimed interests as a part of its "reasonableness" analysis. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 116-19 (1998) (finding that this "search

incident to citation" did not sufficiently further the twin goals of search incident to arrest – officer safety and the collection of evidence of the offense); *Garner*, 471 U.S. at 9-12 (finding that using deadly force to effect an arrest actually is counterproductive to the purposes for arrest); *United States v. Place*, 462 U.S. 696, 703 (1983) (governmental interests did not support the length of the detention in question); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (Plurality Op.) ("[I]nvestigative methods employed [by law enforcement] should be the least intrusive means reasonably available [to effect the stated purpose, which in this case was a stop]."); *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1979) (discovering unlicensed drivers not sufficiently accomplished by system of "spot checks" not supported by probable cause to withstand Fourth Amendment analysis). Under this rationale, a custodial arrest for a fine-only traffic violation where the driver is a resident who can be identified at the scene and is willing to sign a promise to appear must be viewed as unreasonable under the Fourth Amendment, as the custodial arrest does nothing more to ensure appearance than would the citation.

Of course, where the person cannot be reasonably identified, the opposite could be true, as the state's interest in ensuring the driver's appearance in court may not be satisfied through the issuance of a citation. For example, if the driver has a license but is not carrying it, then the police officer may or may not be able to fix the driver's identity through means of other identification along with a computer check.[4] Where the driver is from

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[4] In the case at bar, Gail Atwater did not have her operator's license with her at the time of her arrest, as she had her purse stolen two days before. *See Atwater v. City of Lago Vista*, 195 F.3d 242, 248 (5th Cir. 1999) (Wiener, J., dissenting), *cert. granted*, 120 S.Ct. 2715 (2000). Nonetheless, Officer Turek obviously knew her and she was able to produce a checkbook with her driver's license number and home address on it – quite enough to pull her record on the computer and confirm that she was who she said she was.

out of state and thus not so easily arrested if he fails to appear in court, the state's interest may not be satisfied. Likewise, where the driver refuses to sign the citation indicating that he will appear in court, the central purpose of arrest is obviously frustrated. Where the resident driver with a valid driver's license is concerned, however, and that person is willing to sign an agreement to appear in court, the full custodial arrest is redundant.

2. No Other Legitimate Law Enforcement Interests Can Justify The Arrest.

Other state law enforcement interests in the arrest versus citation context have been mentioned, although they are always secondary to the interest in ensuring the defendant's appearance at trial. *See, e.g.*, Salken, *supra*, at 266 (identifying the additional governmental interests in obtaining evidence of the crime, preventing future harm, providing social service functions, and maintaining proper respect for law and for the police); Brief of Respondent, *Ricci v. Village of Arlington Heights*, No. 97-501, 1998 WL 134006 at *20-21 (an arrest is a means by which an officer can assert control over potentially threatening situation). As with the government's interest in ensuring the driver's presence at trial, however, the power to arrest on the actual traffic violation does nothing to further these interests, either.

"Preventing future harm" and "controlling a potentially threatening situation" appear to be one and the same. This is a valid state law enforcement interest. Performing a custodial arrest for a traffic violation, however, is a very indirect way to further it. If there exists a dangerous situation or if a person appears prepared to breach the peace or pose a danger to the officer or others, then, as outlined below, some other law certainly exists to directly address that threat. *See, e.g., Terry*, 392 U.S. at 22-27 (clearly giving police the power to address a potentially dangerous situation).

The government's interest in collecting and preserving evidence of the offense for use at trial is also a legitimate interest that is recognized by this Court. *See United States v. Robinson*, 414 U.S. 218, 234 (1973). However, this Court has also recognized the obvious reality that there will not be any evidence of a traffic offense to collect and preserve. *See Knowles*, 525 U.S. at 118. Because of this, and because of the reduced threat to officer safety during a traffic stop where a citation is given, the two historical rationales of the search incident to arrest are not sufficient to justify a search incident to arrest where a traffic citation is issued. *See Knowles*, 525 U.S. at 116-17. Before the citation is issued, however, in most states the police officer making the stop has probable cause to arrest and can therefore conduct a full search incident to arrest as soon as the driver is pulled over. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (search incident to arrest need only be justified by probable cause to arrest and need not occur after formal arrest); *see also, e.g., United States v. Lugo*, 170 F.3d 996, 1000-03 (10th Cir. 1999) *and Williams v. State*, 726 S.W.2d 99, 99-101 (Tex. Crim. App. 1986) (giving *Rawlings* precisely that interpretation in the

traffic stop context). This, as many have recognized, gives police officers the ability to use a traffic violation as a pretext in order to conduct a search for other evidence not involving the traffic violation.[5] But because these searches are technically supported by probable cause, this Court has instructed that the police officer's motives cannot be questioned. *See Whren*, 517 U.S. at 812.

As a tool for creating uniformity in the analysis of police stops, the fact that probable cause will support a stop or search regardless of the police officer's motives is

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[5] Professor LaFave has observed:

> There is a much more powerful reason for being concerned about the unquestioned application to traffic violation cases of the "general authority" to search incident to arrest. "There is," as the *Robinson* dissenters properly emphasized, "always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search." Given the fact, as they noted, that "in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer," and that "very few drivers can traverse any appreciable distance without violating some traffic regulation," this is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to full search. Nor is one put at ease by what evidence exists as to police practices in this regard; it is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects who could not be lawfully arrested for the crimes of which they are suspected.

WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(e) (3d ed. 1996) (citations omitted).

useful. Subjective motives on the part of the police are (for a number of reasons) very difficult to prove in the first place, thereby making a workable standard to apply across the board a near impossibility. But one must admit, however, that using a traffic stop as a mere excuse to go on a fishing expedition through the passenger compartment of a driver's car searching for any contraband he may (or may not) find is, at least as a concept, repugnant to the Constitution. *See Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."). This practice really does show a remarkable resemblance to the general warrants and writs of assistance so despised by the framers of the Constitution. *See* Salken, *supra*, at 254-58 (detailing history of the writs of assistance and general warrants and their contribution to both the American Revolution and the framing of the Fourth Amendment). Nonetheless, this practice is widely used by police departments, and anecdotal studies are beginning to emerge showing the abuses inherent in such a practice. *See, e.g.*, David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways* (June 1999) at 13, available at *www.aclu.org/profiling/report* (detailing one incident where a black man was stopped for not wearing a seatbelt and the police officers dismantled his car searching for contraband – finding none, they left the driver with a screwdriver to repair his car); William H. Buckman & John Lambreth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, THE CHAMPION (Sept./Oct. 1999) (speaking to the general problem of racial profiling). Such police activities are not subject to review under the Fourth Amendment where the state law gives

them probable cause to arrest for a traffic violation. *See Whren*, 517 U.S. at 812-13.

Upon arrest, the state's law enforcement interests justifying a search incident to that arrest are clearly legitimate. *See Robinson*, 414 U.S. at 234. The state, however, cannot and should not be able to claim a legitimate interest in conducting an arrest simply to justify such a search. Certainly such a claim could not be justified by the traditional reasons for a search incident to arrest – officer safety and preserving evidence of the offense. *See id.* Conducting a traffic stop as a pretext to be able to search, while not a valid basis of review under the Fourth Amendment, *see Whren, supra*, cannot be raised to the status of a "legitimate state interest" for purposes of Fourth Amendment balancing. The state is therefore left with the traditional justifications for a search incident to arrest, which do not apply to a situation where a citation is issued. *See Knowles*, 525 U.S. at 117.

Another state interest that cannot be considered legitimate is the police officer's personal interest in "teaching the driver a lesson" by conducting an arrest.[6] *See Atwater*, 195 F.3d at 250 (Wiener, J., dissenting) (citations omitted). Dovetailing into this interest is the interest of a state in having its citizens possess the proper respect for law enforcement. *See* Salken, *supra*, at 271-72. Respect for police officers is on the whole warranted and their advice should generally be followed by the citizenry. In fact, under some circumstances, it can be a crime not to do so.

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[6] This appears to have been Officer Turek's interest in this case. *See id.* at 248. Citing *Whren*, the majority in *Atwater* refused to review Officer Turek's behavior. *See id.* at 244-45 (citing *Whren*, 517 U.S. at 817). Note that the record does not disclose that Gail Atwater was disrespectful to Officer Turek in any way.

See, e.g., TEX. PENAL CODE ANN. § 38.02 (Vernon 1999) (refusing to identify oneself to a police officer is an offense). Likewise, disrespect for the police could reach the point where a breach of the peace actually occurs. *See, e.g.*, TEX. PENAL CODE ANN. § 42.01 (Vernon 1999) (disorderly conduct). However, *Amicus* would be surprised to find that in any jurisdiction in the United States it is an offense not to respect (or to even be directly disrespectful to) a police officer. *See, e.g.*, TEX. PENAL CODE ANN. § 38.15(d) (Vernon 1999) (it is a defense to prosecution for interfering with a public servant if that interference was by speech alone). And if such a law actually exists, *Amicus* would be even more surprised if, upon review, this Court gave that law its stamp of approval. *See* U.S. CONST. amend. I. Punishment is a matter for courts and juries, not police officers. *See Atwater*, 195 F.3d at 250 (Wiener, J., dissenting); Salken, *supra*, at 272.

In response to the question of whether circumscribing the power to conduct a full custodial arrest for a traffic ticket would somehow diminish the respect that citizens have for law enforcement, *Amicus* would submit that the majority of people on the roads probably do not have the slightest idea that they can be arrested for a minor traffic violation. And even if they do, how can the power to arrest for a traffic offense engender respect for law enforcement? Bart Turek's actions in this case have done little to increase the citizenry's respect for law enforcement. And even where the officer does not have a personal agenda the connection between custodial arrests for traffic offenses and respect for law enforcement is tenuous to say the least.

3. Because of Other Pronouncements of This Court As Well As Other Applicable State laws, The Impact on "Effective Law Enforcement" From Granting Petitioners' Relief in this Case Would Be Marginal at Best.

The illusory nature of the government's interests in a custodial arrest for a fine-only traffic violation is further demonstrated through an examination of other laws that apply to traffic stops and give police further investigatory powers. For instance, even if the discretionary power to conduct custodial arrests for traffic violations were shorn away from our law enforcement officers, they would still have the power to *stop* a driver upon seeing such a violation. *See Whren*, 517 U.S. at 818. This would apply even if the officer was stopping the driver for some other reason besides the traffic violation. *See id.* at 813. Upon being stopped, the officer may ask the driver, as well as the passengers, to step out of the car. *See Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). If the officer has reasonable suspicion at that point to believe any of the occupants of the car is armed, he may do a protective sweep of the entire passenger compartment of the car. *See Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983). He, of course, may do the same with the body of the driver and passengers. *See Terry*, 392 U.S. at 27. If, during the protective search of the car, the officer should "discover contraband other than weapons," he may arrest whoever is found to possess it. *Long*, 463 U.S. at 1050. At this point, the officer would have the power to conduct a full search incident to arrest not only of the arrested person, *see Robinson*, 414 U.S. at 236, but of the entire passenger compartment of the automobile as well as all containers found within. *See New*

York v. Belton, 453 U.S. 454, 460 (1981). Of course, the police officer may always just ask for consent to search the entire car. *See Ohio v. Robinette*, 519 U.S. 33, 35 (1996). And it goes without saying that once an officer is standing next to the car, if probable cause develops for some other reason (e.g., because of contraband in plain view, marijuana smoke emanating from the car, etc.), then the officer may search the entire car to the extent that he could with a warrant, *see United States v. Ross*, 456 U.S. 798, 823 (1982), including any "containers within it where [the officer has] probable cause to believe contraband or evidence is contained," whether in the passenger compartment or in the trunk, *see California v. Acevedo*, 500 U.S. 565, 580 (1991), or in secret compartments, such as behind the upholstery of the car's seats. *See Carroll v. United States*, 267 U.S. 132 (1925). In light of all these police powers that would be in no way affected, it cannot be reasonably argued that to deny their power to automatically arrest for fine-only traffic violations would "constitute an intolerable handicap for legitimate law enforcement." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

Likewise, if the police officer is facing a situation where a driver is an obvious danger or is breaching the peace, chances are the driver is committing some other offense for which arrest is entirely reasonable. For example, the offense of driving while intoxicated, upon first conviction, is a Class B Misdemeanor in Texas with a range of punishment of 72 hours to 180 days in jail and up to a $2,000 fine. *See* TEX. PENAL CODE ANN. §§ 12.22 & 49.04 (Vernon 1999). For those who refuse to show the officer their license or lie about their identity, refusing to identify oneself to a police officer is a Penal Code offense in Texas, a Class B Misdemeanor punishable by up to six

months in jail and up to a $2,000 fine if that person has an outstanding warrant for his arrest. *See* TEX. PENAL CODE ANN. §§ 12.22 & 38.02 (Vernon 1999). Obstructing a highway or not moving one's vehicle when told to by an officer is a Class B Misdemeanor in Texas. *See* TEX. PENAL CODE ANN. § 42.03 (Vernon 1999). Fleeing in an automobile from a police officer who is attempting to make a lawful stop is a Class A Misdemeanor in Texas, carrying a range of punishment of up to a year in jail and up to a $4,000 fine for a first offense, a felony thereafter. *See* TEX. PENAL CODE ANN. §§ 12.21 & 38.04 (Vernon 1999). Even the offense of reckless driving carries a possible jail term. *See* TEX. TRANSP. CODE ANN. § 545.401(b) (Vernon 1999) (up to 30 days in jail). A custodial arrest for any of these offenses would be entirely reasonable (assuming probable cause existed), for in each case the state's interests in making the arrest are obviously greater and cannot necessarily be satisfied without a full custodial arrest. Not surprisingly, with the exception of reckless driving, the police officer does not even have the option of issuing a ticket on any of the above cited offenses. These could not be considered "regulatory offenses." The vast majority of traffic offenses, however, can be and are.

In sum, where a resident driver has been stopped for a fine-only traffic offense, presents sufficient identification and is willing to sign a promise to appear, it is unreasonable under the Fourth Amendment to subject her to a full custodial arrest. This conclusion is easily arrived at through traditional balancing analysis. The state's interests at that point are clearly outweighed by the individual's because the arrest does absolutely nothing to further them. *Cf. Garner*, 471 U.S. at 10-11. As was

also the case in *Garner*, however, this is not a situation where the laws as they currently stand are facially unconstitutional. *See id.*, 471 U.S. at 11. Therefore, some standard for their application consistent with the Fourth Amendment must be derived. *See id.* at 11-12.

II.

THIS COURT COULD EASILY CRAFT A WORKABLE STANDARD FOR DETERMINING WHEN ARRESTS FOR FINE-ONLY TRAFFIC OFFENSES COULD BE REASONABLE UNDER THE FOURTH AMENDMENT

This Court's prior cases would support at least two possible solutions to the problem under the Fourth Amendment of discretionary arrests for fine-only traffic offenses where the driver may be identified and is willing to sign a promise to appear. One solution would put in place a standard whereby an officer could arrest for the traffic violation if he could articulate reasons why the citation would be insufficient to satisfy the state's interest in ensuring the driver's appearance at trial. The other solution would be a "bright line rule" with exceptions, such as that used in other unreasonable seizure cases from this Court.

A. Solution #1: Formulate a *Terry*-style Constitutional Arrest Justification Standard.

In his dissenting opinion below, Judge Wiener suggested a test for determining the reasonableness of a custodial arrest that is reminiscent of the test first announced in *Terry v. Ohio*, 392 U.S. 1 (1968) for justifying

a stop and frisk.[7] *See Atwater*, 195 F.3d at 249 (Wiener, J., dissenting) (citing *Terry*, 392 U.S. at 21). Judge Wiener conformed the *Terry* standard to the situation where the police officer has made a lawful stop and must choose between issuing a citation or conducting a full custodial arrest. *See id.* Thus conformed, the test is as follows:

> [T]o justify each successive, increasingly stringent intrusion on an individual's liberty and privacy interests, a police officer must at a minimum be able to articulate some reason why it was necessary to effect the further intrusion. The articulated reason does not need to be independent of the reasons that justify the initial intrusions: "The test is whether those interests are sufficiently substantial, not whether they are independent of the interest in investigating crimes effectively and apprehending suspects." But where the identified reasons for both the initial and the successive intrusions are the same, a police officer must be able to advance a plausible claim that the initial intrusions were inadequate fully to serve the proffered governmental interests. If the officer cannot plausibly make that claim – in other words, if there were no legitimate reasons for the further intrusions – then the heightened intrusions are by definition "unreasonable."

Atwater, 195 F.3d at 249-50 (Wiener, J., dissenting).

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[7] "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 391 U.S. 1, 21 (1968).

While not a "bright line" rule, this test should not be any harder for the police officer on the street to apply than it would in the stop and frisk context. The "reasonable suspicion" standard enunciated in *Terry* is a substitute for probable cause in a situation where the law enforcement interests are so strong (search for weapons) that an intrusion upon the rights of individuals on a standard less than probable cause is justified. *See Terry*, 392 U.S. at 22-27. What Judge Wiener proposes is to use the same type of standard – even where probable cause to arrest is present – to justify each additional, increasingly invasive step. Applying such a condition upon police conduct even where probable cause is present is not unheard of in Fourth Amendment analysis, *cf. Terry*, 392 U.S. at 28-29 (observing that the Fourth Amendment imposes preconditions upon governmental action); and *see Garner*, 471 U.S. at 11 (even in light of existing probable cause, use of deadly force to affect arrest constitutionally unreasonable).

Judge Wiener's test, however, should be more specific than set out in his dissenting opinion. First of all, it should expressly apply only in situations where the officer has the discretion whether to issue a citation or to effect a full custodial arrest. It is only in this situation where the law enforcement interest in securing the defendant's presence at trial can be fully satisfied without an arrest. If, for instance, the officer cannot verify the driver's identity, then that fact could be an "articulable reason" for going the extra step and arresting the driver. The fact that the driver presented a danger or was breaching the peace may be other possible reasons. Because the officer wanted to teach the driver a lesson, however, would certainly be insufficient. Secondly, it

should only apply to those fine-only regulatory violations such as the type found here, where the state's classification of the offense as fine-only indicates its low interest in arrest and thus the law enforcement interests are far outweighed by the individual's interests protected by the Fourth Amendment.

This test would have the advantage of placing controls on the presently unlimited discretion of the police officer in making the decision of whether to arrest or to issue a citation. It would have the advantage of being an "objective test" and there would be no apparent reason to get into the police officer's subjective intentions, so long as some objective reason to arrest could be articulated. Not being a "bright line rule," this test's contours, as in the case of stop and frisk, would "have to be developed in the concrete factual circumstances of individual cases." *Terry*, 392 U.S. at 29. But there is no reason to believe that the courts would not be able to sort it out.

B. Solution #2: Announce a Bright Line Rule – No Arrests For Fine-Only Misdemeanors.

The alternative would be to announce a bright line rule – where an offense carries only a fine and the police officer is satisfied with the driver's identity and the driver is willing to sign a promise to appear, then the officer cannot affect a full custodial arrest unless probable cause develops from another source. The "other sources" from which probable cause could develop are, for instance, those rules already established in this Court's precedents or that the driver is found to be committing some other crime. *See, supra*, Section I.B.3. This, in effect, would be a bright line rule subject to exceptions such as that announced by this Court in *Garner*, 471 U.S. at 11-12.

In *Garner*, it was held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.* at 11. However, this Court carved out an exception "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. . . . " *Id.* In this case, the appropriate bright line rule would be: Where the police have the discretion to either arrest or to issue a citation and a person has been stopped for a fine-only offense and he has presented satisfactory identification and is willing to sign a promise to appear, it is constitutionally unreasonable to arrest that person unless probable cause to arrest develops from another source independent of the fine-only offense. The converse, of course, would be true if the officer could not reasonably ascertain the person's identity or he was not willing to sign a promise to appear. There might also have to be an exception for out of state drivers, for in the case of those drivers, an arrest may be more easily justified because of the reduced ability to ensure their presence in court. In the final analysis, however, for the resident, this would be a workable rule and as easy to implement as any bright line rule.

C. Applicability To Other Areas.

Traffic offenses, of course, are not the only fine-only regulatory offenses. *See Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), *cert. granted*, 522 U.S. 1038, *and cert. dismissed*, 523 U.S. 613 (1998). There is no reason to believe that the rule announced in this case would not have applicability outside of traffic offenses. However, the same rationale would apply as well. So long as a police officer has discretion whether to issue a citation or

effect a full custodial arrest and the offense is punishable by a fine, it would be just as unreasonable to arrest a person off the highway as on when the state's interests would be completely satisfied with a citation.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

GAIL ATWATER, Individually, and MICHAEL HAAS as next friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK and FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE INSTITUTE ON CRIMINAL JUSTICE AT THE UNIVERSITY OF MINNESOTA LAW SCHOOL AND ELEVEN LEADING EXPERTS ON LAW ENFORCEMENT AND CORRECTIONS ADMINISTRATION AND POLICY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI[1]

This brief is filed on behalf of the Institute on Criminal Justice at the University of Minnesota Law School and a group of interested individuals with relevant expertise.

The Institute on Criminal Justice ("ICJ") is part of the University of Minnesota Law School.[2] The Institute combines its work on issues of current concern to criminal justice practitioners and policymakers with the academic research interests of the faculty. Its major objective is to provide unbiased, practical information regarding emerging criminal justice issues to help guide policy decision making. The ICJ also provides technical assistance to government agencies on criminal justice matters, including jail practices and evaluation of court programs. The Institute's Executive Director, Janet Wiig, JD, MSW, is a former prosecutor; the Director of Research, Professor Richard S. Frase, has expertise in criminal law and procedure, jails, and sentencing. Recent ICJ projects have focused on issues such as jail overcrowding and comparative state sentencing practices. The ICJ is filing this brief to further its mission of providing unbiased, practical information, and because the issues raised by this case

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[1] A list of the 11 individual amici who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici curiae or counsel, have made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

[2] The views of the Institute, expressed in this brief, do not necessarily reflect the views of the University of Minnesota.

have implications for the effective administration of justice in this country.

The remaining amici have joined this brief in their individual capacities; their biographical information (including present and former affiliations) is provided in Appendix A for identification and background purposes only. This group includes present and former jail administrators, criminal justice system practitioners, academic researchers with expertise on the administration of justice and law enforcement issues, and nationally-regarded experts on criminal law, jail operations, pretrial services, court administration, and police issues. Each of these individuals is widely known and highly respected in the law enforcement, corrections, and research communities. Every member of this group is committed to effective law enforcement policy and shares in the view that the arrest practice at issue in this case is contrary to law enforcement interests.

By virtue of their expertise and long-standing involvement with issues of jail management, law enforcement practices, court administration, and citation release, amici are uniquely equipped to provide the Court with information and policy perspectives that bear on the constitutional issues raised in this case. As a group, their goal is to ensure that law enforcement interests are addressed appropriately in this case, and that the Court is aware of how its ruling could impact the work of law enforcement officials around the country.

SUMMARY OF ARGUMENT

A full custodial arrest for a non-jailable misdemeanor is rarely necessary or justifiable. An individual has a substantial interest in avoiding the trauma and risks of a

custodial arrest; in most cases, no legitimate law enforcement purpose is served by such an arrest that would not be better served by the issuance of a citation; and unnecessary arrests are contrary to the interests of jail managers, court administrators, and even the police. Any balancing of the interests involved clearly favors the individual arrested. The same result is reached when such an arrest is examined under the proportionality standard of the Fourth Amendment.

Model standards promulgated by prominent national organizations such as the American Bar Association, the American Law Institute, the National District Attorneys Association, and the National Association of Pretrial Services Agencies, offer valuable guidance with respect to this issue. These standards all require the police to issue citations in lieu of arrest in all misdemeanor cases unless there are exceptional circumstances. The experience of several states and law enforcement agencies shows such standards to be workable and effective at meeting legitimate police needs.

Amici urge the Court to adopt a rule barring custodial arrest in all non-jailable misdemeanor cases absent exceptional circumstances.

ARGUMENT

I. A Balancing of the Interests Involved Shows That a Custodial Arrest for a Non-Jailable Misdemeanor Offense is Unreasonable

A. An Individual's Interest in Avoiding the Trauma, Risks, and Consequences That Result from a Custodial Arrest Is Very Strong

A clear understanding of what happens in the arrest and jailing process is critical in order to assess the

strength of an accused's interest in avoiding arrest. Persons who have not been through it can hardly imagine the full extent of the intrusiveness of an arrest. An arrest is nothing less than a frontal assault on the dignity, privacy, and safety of the accused. That trauma is magnified for an individual experiencing the criminal justice system for the first time.

1. The Arrest and Booking Process Includes Many Administrative Tasks That Are Psychologically Threatening and Embarrassing to the Accused

From the moment of arrest, an accused is subjected to intensive physical scrutiny and psychological pressures. Prior to placement in a patrol car, the individual will typically be subjected to a routine, suspicion-less search of her person, an action that, if properly done, involves extensive touching of her entire body, including the most private parts. This search may extend to any areas or objects within the arrestee's immediate control, the passenger compartment of any vehicle she occupied when arrested, and the contents of any clothing, purses, or other containers located therein.

An arrestee is then typically handcuffed behind her back and placed in the patrol car. This is a very public exercise, and may be witnessed by bystanders, neighbors, friends, and family.

At the police station or jail,[3] the accused typically is fingerprinted and photographed. Before being placed in a

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[3] Depending on the jurisdiction, an arrested person may be taken to a police lockup, a municipal lockup, and/or a city, county, or regional jail. Therefore, the practice at issue in this case has implications for all such facilities. The word "jail" will be used in this brief to include police and municipal lockups.

cell, the arrestee will again be searched, including a pat-down of the genital areas and under and around a woman's breasts. An officer of the opposite sex may conduct the search. In some jails, the accused may be strip searched.

An officer will go through personal effects, including wallets and purses, for inventory purposes. A full-custody arrest also typically results in impounding the detainee's car if she was arrested while in a vehicle, which then permits routine, suspicion-less searches of every part of the car, including the trunk, and any containers therein.

In Phoenix, the accused is videotaped during the booking process through the Sheriff's web camera, so that anyone in the world with Internet access can view her under these trying circumstances.[4]

An individual requiring use of toilet facilities may need to use them in full view of many other inmates and staff. She may be made to shower in front of officers and other inmates. And she may be sprayed for lice.

Intake officers ask the detainee very specific questions on topics of personal hygiene, health, and mental health. Indeed, the better managed the jail, the more intrusive these questions will be because of the screening functions they serve.

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[4] This website claims an average of 2.5 million viewers a day. *See* Julie Cart, *As He Runs For 4th Term, Toughest Sheriff is Ever Inventive*, L.A. Times, Aug. 23, 2000, at A-5. Although the Phoenix practice is not the norm, it involves the nation's fourth largest jail, and therefore affects a substantial number of detainees.

A pretrial services officer may telephone the accused's employers and associates to verify information relevant to pretrial release.

The individual has only limited access to telephones to make calls to secure her release or to arrange for the care of her children. Calls typically must be made within earshot of other detainees.

The arrest record may be permanent and can haunt the person for years to come, even if charges are dismissed or never filed. The very fact of arrest, or simply the time lost while involuntarily confined, can result in lost wages or even loss of a job.

These indignities, deprivations, and hardships make the arrest and booking process far more than a minor inconvenience. A custodial arrest constitutes a serious personal intrusion on an individual's liberty and dignity.

2. Temporary Detention Carries Many Physical Risks, Including Risk of Assault, Exposure to Infectious Diseases, and a Heightened Risk of Suicide

Corrections professionals agree that

> [n]o other criminal justice activity can claim the convergence of such potentially dangerous people or circumstances which are present at [jail] intake. Intake presents the most potential for injury to staff and prisoners because of the instability or uncertainty of the prisoners or the circumstances in which they find themselves.

Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part One: Resources*, American Jails, Mar./Apr. 1999, at 108. Intake has been described as "the most critical area of a jail operation." *Id.* at p. 110.

During the booking process, individuals are often housed in group cells with many other detainees. Amici have personally seen as many as 40 arrestees in one cell. Because individuals have not yet been classified (separated by characteristics such as offense, risk, or health needs), someone who has been arrested for a petty offense can be confined with those accused of murder, rape, or other violent crimes, mentally unstable persons, and people with diseases such as tuberculosis, hepatitis, and AIDS. *See* Arthur Wallenstein, *Intake and Release in Evolving Jail Practice, in* Prison and Jail Administration: Practice and Theory 50 (Peter M. Carlson & Judith Simon eds., 1999). There is a real risk that an arrestee, even one charged with a minor offense, will be assaulted or exposed to infectious diseases.

Some physical and psychological conditions (including chemical dependency, anxiety, and depression) are likely to be seriously aggravated by incarceration. A handbook distributed to jail officials cautions booking officers to be "acutely aware that being arrested or incarcerated, especially for the first time, can be extremely traumatic for many persons." The National Sheriffs' Association, *Jail Classification and Discipline* 34 (1988).

The first 24 hours in jail are considered the most deadly. Many jail inmates arrive with an elevated suicide risk, which increases during the first hours of custody. L. Thomas Winfree, Jr., and John D. Wooldredge, *Exploring Suicides and Deaths by Natural Causes in America's Jails, in* American Jails: Public Policy Issues 64 (J. Thompson & G. Mays eds., 1991). Research shows that nearly 30 percent of all jail and lockup suicides occur within 3 hours of admission, and 50 percent of all jail and lockup suicides occur within the first 24 hours of intake. *See* Joseph

Rowan, *Suicide Prevention*, American Jails, Nov./Dec. 1994, at 24; The National Sheriffs' Association, *supra*, at 34 (citing L.M. Hayes & B. Kajdan, *And Darkness Closes In*, National Center on Institutions and Alternatives, Alexandria, Virginia, (1981)).[5] Furthermore, research suggests that the group most likely to commit suicide includes those inmates who are just "passing through," or short-term detainees. Winfree and Wooldredge, *supra*, at 77. A minor offender faced with incarceration may be exposed to a set of such terrifying and unfamiliar circumstances in jail booking that her risk of suicide is particularly elevated.

Amici note with concern that there are special risks associated with lockup facilities, such as the one involved in this case. *See supra* note 3. Police and municipal lockups tend to be essentially unregulated facilities, and, as such, they "fly under the radar screen" and may not adopt operations policies designed to ensure inmates' safety.[6] Lockups, especially those in police stations, are typically run by staff with little formal training in custodial issues. Many are minimally staffed, and thus inmates are inadequately supervised, or even unsupervised. Many of these facilities have poor lines of sight and inadequate safety procedures. As a result, the risks described above may be even greater in lockup facilities.

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[5] In 1989, the national suicide rate in county jails was approximately 107 per 100,000 inmates, almost 10 times the rate in the general population. *See* L.M. Hayes, *National Study of Jail Suicides: Seven Years Later*, 60 Psychiatric Quarterly 7 (1989).

[6] Significantly, no major urban police department that runs its own lockup facilities has been accredited by the Commission on Accreditation for Law Enforcement Agencies (CALEA), due to poor conditions in these lockup facilities.

In sum, amici believe an individual's interest in avoiding the traumas, risks, and indignities that result from the arrest and booking processes is substantial, especially for those who are unfamiliar with the process.

B. In Most Cases, There Is No Legitimate Law Enforcement Interest in Making a Custodial Arrest for a Non-Jailable Misdemeanor Offense

Respondents have a legitimate law enforcement interest in ensuring that the state's seat belt laws are observed, and that violators pay the penalties authorized by the Legislature for these offenses. However, except in very unusual circumstances not present in this case, these law enforcement interests are fully served by issuing a citation. Thus, the police do not need, and should not be given, unlimited discretion to make custodial arrests for such offenses.[7]

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[7] Respondents may seek to justify such unnecessary custodial arrests by citing recent decisions of this Court, upholding broad police powers to conduct investigatory or safety measures without any showing of a case-specific need for such measures. In the context of this case, however, such a "bright line," over-broad rule is unjustified. Some of the Court's decisions of this type were based on the government's strong need to routinely search or seize even in the absence of individualized suspicion. *See, e.g., Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *South Dakota v. Opperman*, 428 U.S. 364 (1976). There is no analogous need for routine custodial arrest in cases of non-jailable crimes. Other decisions were based on the difficulties which the police and courts would have in making and evaluating case-specific assessments of the need to search, exigent circumstances, etc. *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973). In Petitioner's case, and in most cases like it, the need for custodial

A citation instructs the violator to appear in court on or by a particular date, and specifies the penalties for the offense and for failure to respond to the citation. Citations are a widely used and highly effective method of ensuring that minor offenders pay the penalties associated with their offenses. Citations have also been shown to be a highly effective deterrent. See, e.g., James M. McMahon, *New York State Takes the Next Step in Saving Lives*, The Police Chief, July 2000, at 34-39 (vigorous enforcement by police using citations has significantly increased seat belt compliance in New York State).

Custodial arrest is needed only when it could further an investigation, prevent some serious harm, or ensure the violator's appearance in court. Amici believe that such legitimate needs rarely exist in cases involving minor, non-jailable offenses. Most of these suspects, and almost all traffic offenders, can be fully identified from drivers license and/or vehicle records, and thus are unlikely to permanently evade justice. No further evidence-gathering is usually required; the investigation is complete at the scene. Nor, in most cases, is there any reason to fear imminent harm to anyone, immediate resumption of the offense, or failure to appear in court. Logic also tells us that minor traffic offenders are unlikely

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arrest will rarely be present, and can be easily assessed on a case-by-case basis (as is demonstrated by the numerous model standards and state laws providing for such case-specific assessments, *see* Parts III and IV below). Finally, some broad police-powers decisions were based on the limited nature of the intrusions or privacy interests involved. *See, e.g., New York v. Burger*, 482 U.S. 691 (1987); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). As was shown in Part A above, custodial arrest is *not* a brief or relatively minor intrusion.

to flee the community to avoid paying a fine. Thus, not only in this case but in most cases of non-jailable misdemeanors, the alternative of issuing a citation fully meets all legitimate government interests in ensuring effective enforcement of the law.

In most non-jailable misdemeanor cases, a custodial arrest serves only one purpose: to impose unofficial "punishment" on offenders who cannot legally be sentenced to incarceration. Patrick G. Jackson, *Competing Ideologies of Jail Confinement*, *in* American Jails: Public Policy Issues 30 (J.A. Thompson & G.L. Mays eds., 1991). This is a flagrant abuse of the arrest power.

C. Not Only Does Arresting an Individual for a Non-Jailable Misdemeanor Offense Typically Serve No Legitimate Law Enforcement Purpose, Such an Arrest Actually Contradicts Law Enforcement Interests

Subjecting a minor traffic violator to a custodial arrest is not only unnecessary, it actually creates more serious problems for law enforcement. Short-term detainees such as Ms. Atwater cause significant management problems for jail administrators. They also burden the courts and magistrates with additional workload in the hours immediately following arrest. Moreover, arrests such as this remove the arresting officer from patrol duty, thus compromising public safety, and reduce the public's confidence in the law enforcement community. These problems must be taken into account in any balancing test of the reasonableness of the arrest.

1. Custodial Arrests of Non-Jailable Misdemeanants Present Serious Management Problems for Jail Officials and Produce Bottlenecks in the Booking Areas of Jails Which Are Costly, Dangerous, and Staff-Intensive

Jail managers and those who study jail operations have long known that short-term detainees place the most significant strain on the jail's resources. As noted above, every detainee must be booked, searched, photographed, and fingerprinted, and extensive paperwork must be completed. The American Jail Association's training course on intake procedures includes a checklist of more than 350 tasks to be completed during the intake process. *See* Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part Two: Intake Task Analysis*, American Jails, May/June, 1999, at 112-116. These administrative tasks can be time-consuming and staff-intensive. In larger jail facilities, the sheer numbers of individuals brought to the jail can result in processing delays of up to 48 hours.[8] High inmate turnover increases these administrative costs and processing delays. Richard S. Frase, *Jails, in* Handbook of Crime & Punishment 482, 493 (Michael Tonry ed., 1998).

Crowding in the booking areas of jails and lockups is exacerbated by the all-too-frequent problem of crowding in permanent housing areas in jails. Put simply, there is sometimes no place to move arrestees whose paperwork has already been processed. This is called the "booking

[8] In a jurisdiction with no evening or weekend magistrate, a person arrested on a Friday evening for a non-jailable offense may well spend over 65 hours in jail prior to their first court appearance.

bottleneck." Booking areas of jails are ill-equipped in most cases to handle significant numbers of inmates. Large numbers are confined in group cells that are poorly ventilated and have exposed toilets. As noted above, the risk of assault, suicide, and spread of infectious diseases in booking areas is uncomfortably high, and affects both staff and detainees. Any minor misdemeanant brought to the booking area simply aggravates the crowding problem and escalates the risks involved, by burdening staff with additional administrative tasks and diverting them away from critical tasks such as monitoring suicide and assault risks.

A 1984 National Institute of Justice study showed that law enforcement policies, such as decisions to crackdown on particular offenses, can have immediate and significant impacts on jail populations and thus on jail conditions. *See* National Institute of Justice, *Jailing Drunk Drivers: Impact on the Criminal Justice System*, Washington D.C. (1984).[9] In a jurisdiction with a crowded jail or lockup facility, this can mean even more rapid deterioration of the facility. *See* G. Larry Mays and Joel A. Thompson, *The Political and Organizational Context of American Jails, in* American Jails: Public Policy Issues 15 (J.A. Thompson & G.L. Mays eds., 1991).

In sum, there are exceptional management problems associated with arresting these high-turnover inmates.

[9] Amici do not challenge the practice of arresting drunk drivers because these are usually jailable offenses, and there are typically significant law enforcement interests supporting the arrest (e.g., the need to prevent further impaired driving, and to collect reliable blood or breath samples). The research in this field is nevertheless useful because it documents the connection between law enforcement practices and jail population.

Correctional professionals accordingly discourage the practice of arresting misdemeanor offenders, and encourage a reduction in the number of transient inmates brought to the jail.

A ruling by this Court supporting the power of police to subject fine-only traffic offenders to a full custodial arrest could have major implications for jail managers, by increasing the number of transient inmates brought to jails around the country. This includes not only small rural municipal lockups, such as the one involved in this case, but large metropolitan jails as well. As a result, administrative costs would increase, and the ability of jail managers to protect arrestees would be hampered. Amici would predict a significant increase in the number of suicides, assaults, mental health problems, and inmates with communicable diseases, and an increase in lawsuits against jail managers, other officials, and local governments.

2. Custodial Arrests in Non-Jailable Misdemeanor Cases Burden Courts, Magistrates, and Pre-Trial Release Programs

Most jurisdictions have implemented a variety of programs and methods to assist in reducing the number of minor, low-risk detainees held in the jail. In addition to citation release by the police, techniques include recognizance and other pre-trial release programs; bail reform measures allowing for easier-to-meet financial conditions; added availability of judges during evenings and weekends; and earlier prosecutorial screening, to give just a few examples. National Institute of Justice, *Alleviating Jail Crowding: A Systems Perspective* (1985). These programs are traditionally managed by court personnel. Use of

these programs can reduce the time an arrestee charged with a misdemeanor spends in jail to only a few hours.

However, whenever an arrestee is processed through the jail prior to release, even if that release comes quickly, the resources of the courts are tapped. For each detainee not released directly by the police, a magistrate will review the case and make bonding and other release decisions. In most jurisdictions, a pretrial service officer will also be involved at this early stage, and valuable staff time will be diverted from more important cases. Most jurisdictions already have overworked court officials and overly long dockets for magistrates. These administrators can ill-afford the additional burden that comes from having to process minor traffic offenders as well.

3. Arresting An Individual for a Fine-Only Traffic Offense Is Contrary to Law Enforcement Interests Because It Removes an Officer from His or Her Duty Station and Negatively Affects the Public's Perception of the Police

In balancing the state's interest in making an arrest against the individual's interest in avoiding arrest, countervailing law enforcement concerns counsel against making an arrest and thus reduce the strength of the government interest. Whenever an officer makes a full custodial arrest, he or she must transport the individual to the booking location, and must complete a significant amount of paperwork. This process removes the officer from patrol duty for up to several hours.[10] As a result,

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[10] Moreover, the arrest may lead either to increased overtime costs for the department or to an officer's missing a

fewer officers are available to handle law enforcement duties and to deal with emergencies. Public safety may be compromised. In other words, the importance of making an arrest must also be balanced against the importance of the officer's remaining on patrol duty. For fine-only traffic offenders and other misdemeanants charged with non-jailable offenses, the weighting of those factors clearly tips in favor of issuing a citation in lieu of arrest except in very unusual circumstances.[11]

Moreover, when police abuse their discretion by making inappropriate arrest decisions, it has significant implications for public relations and public support for law enforcement activities. Ordinary citizens begin to fear the police rather than respect their professionalism, and

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shift due to required court appearances the day following an arrest. Either of these possibilities contradicts law enforcement interests, and is easily avoided by the issuance of a citation.

[11] Although many police chiefs would respond to an officer's abuse of discretion in such cases through administrative means (*e.g.*, disciplinary proceedings or warnings), that alone is insufficient to protect citizens from harmful, unnecessary arrests. In the first place, some law enforcement departments may not be sufficiently professional, and citizens need protection from these departments even more than from well-managed ones. Second, officers sometimes get mixed messages from their superiors; they are simultaneously told to cite traffic violators but also to find as much contraband as possible. The officer therefore arrests traffic violators to search cars and perhaps find illicit drugs. Of course, if contraband is found, the decision to arrest seems reasonable in retrospect. Finally, the reality is that police executives cannot always control the ground-level decisions of their officers. Therefore, it cannot be left solely to police departments to sanction officers for making inappropriate arrest decisions that hurt law enforcement interests.

this affects the ability of police to do their work, not to mention the quality of life in a community.

4. When a Custodial Arrest Results in Significant and Avoidable Problems for the Government, the Government's Interest in Making the Arrest Is Severely Weakened

Whatever the arresting officer's interest purports to be when arresting an individual for a non-jailable traffic offense, it must be counter-balanced by the significant problems that this practice creates for jail managers – who are also government officials – and for police and court administration interests generally. These problems are entirely avoidable if officers simply use the long-standing, effective, and widely accepted practice of citation release for misdemeanor traffic violations.

Amici are deeply concerned about the potential for any ruling that widens the net for minor offenders who can be brought to a jail by police officers. The police practice at issue in this case also shows a lack of concern for jail staff, who have no control over the individuals brought to the jail, who are required to conduct unnecessary and degrading searches of these individuals, and who are placed at risk by the additional crowding caused by these unnecessary arrests. Such arrests also weaken the public's confidence in law enforcement. In sum, amici believe that the government's overall interest in this case is entirely consistent with the interest of the traffic violator in not being arrested.

II. A Custodial Arrest for a Non-Jailable Misdemeanor Offense Violates the Proportionality Principle of the Fourth Amendment

The proportionality principle of the Fourth Amendment bars the use of intrusive measures in minor cases.

This principle is reflected not only in this Court's decisions, but also in common law rules; it thus pre-dates the Court's recent "balancing" approach to Fourth Amendment issues, and represents a distinct basis for finding a search or seizure to be unreasonable. Moreover, because the proportionality principle focuses primarily on the serious nature of the intrusion and the minor nature of the crime, it bars the use of certain measures even when the police have probable cause, and even if police inability to use such measures may prevent prosecution and conviction of the offender.

At common law, misdemeanor arrests were prohibited unless the offense was committed in the officer's presence, and involved an actual or threatened breach of the peace. *See Carroll v. United States* 267 U.S. 132, 156 (1925) (quoting *Halsbury's Laws of England*, vol. 9, part III, at 612). A breach of the peace typically meant a violent or destructive act, *see* Horace Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 572-77 (1923-24), and would not include minor regulatory violations such as the seat belt offense at issue in this case. These common law arrest limitations strongly support the proportionality principle embodied in the decisions of this Court discussed below, that intrusive police measures – including custodial arrest – cannot be used to enforce minor crimes. Indeed, the custodial arrest in this case is even more disproportionate than the arrests prohibited at common law, because many of the latter involved more serious, jailable offenses.

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), this Court held that the police could not make a warrantless entry of a person's house to effect an arrest for a non-jailable, civil offense of drunk driving, even though the officers had probable cause to arrest, and despite a very plausible

claim that delaying the arrest until a warrant was obtained would have resulted in the loss of crucial evidence of intoxication. The Court noted that many lower courts have viewed the seriousness of the offense as an important factor in assessing the reasonableness of a warrantless entry on exigent circumstances; the Court also cited Justice Jackson's view that warrantless entry to arrest for a minor offense would display "a shocking lack of all sense of proportion." *Id.* at 751 (citing *McDonald v. United States* 335 U.S. 451, 459 (1948) (Justice Jackson) (concurring)). Although drunk driving poses major risks to persons and property, the Court considered the legislative classification of these violations as non-jailable, civil offenses to be the best indication of the extent of the state's interest in making an arrest and enforcing this law. *Id.* at 754.

Petitioner's case is a much stronger vehicle than *Welsh* for applying the proportionality standard of the Fourth Amendment, because it involved a highly intrusive full-custody arrest, and a seat belt violation that carried less risk of public harm than drunk driving, a lower authorized fine, and no potential loss of evidence.

In *Tennessee v. Garner*, 471 U.S. 1 (1985), this Court held that police may not employ deadly force to arrest a fleeing, unarmed suspect who is not reasonably believed to pose a significant threat of death or serious physical injury to the officer or others. Recognizing that such a rule might permit some suspects to escape and perhaps even permanently evade capture and prosecution, the Court nevertheless concluded that the use of deadly force to arrest a suspect not believed to be dangerous or to have committed a violent crime would constitute an unreasonable seizure under the Fourth Amendment.

Thus, as in *Welsh*, the Court implicitly recognized that the Fourth Amendment reasonableness standard incorporates a requirement of proportionality between the intrusiveness of the arrest and the seriousness of the offense or offender.

Admittedly, a full-custody arrest is much less intrusive than the use of deadly force. However, the government's interest in making such an arrest for a non-jailable traffic offense is also far less than was the government's interest in apprehending and prosecuting the burglary suspect in *Garner*. Moreover, unlike the situation in *Garner*, limiting police power to make full-custody arrests for non-jailable offenses will have little adverse effect on the enforcement of such crimes, because most minor offenders, and almost all traffic offenders, can be fully identified from drivers' license and/or vehicle records, and thus are unlikely to permanently evade justice.

Several other decisions of this Court have also recognized the principle that police powers are more limited in minor cases. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court held that the severity of the crime is one of three factors to be considered in assessing a claim that excessive force – deadly or non-deadly – was used to make an arrest. And in *United States v. Hensley*, 469 U.S. 221, 229 (1985), the Court suggested (but did not decide) that completed crimes less serious than the felony at issue in that case might not permit the use of *Terry* stop-and-frisk powers. Finally, numerous decisions of lower courts, in a variety of contexts, have considered the seriousness of the offense to be an important factor in determining issues of Fourth Amendment reasonableness, particularly with regard to the use of intrusive police powers. *See* William Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations – Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. Kan. L. Rev. 439, 444, n. 26 (1990).

Taken together, the decisions summarized above demonstrate an important principle: even where the police have probable cause, an arrest may be found to be unreasonable when it involves intrusive police measures that are disproportional to the seriousness of the offense. When, as in this case, the state has declared that an offense is not punishable with incarceration, the use of custodial measures prior to trial is clearly disproportionate to the state's determination of the seriousness of the offense. Therefore, such arrests violate the Fourth Amendment in all but the exceptional case.

III. Model Standards Promulgated by Prominent National Entities Require Police Officers to Issue Citations in Lieu of Arrest for All Misdemeanor Offenses Absent Exceptional Circumstances

Some of the most prominent national associations dealing with administration of justice issues have issued model standards governing the use of citation release. Each organization's standards require or recommend that police officers issue citations in lieu of arrest in most misdemeanor cases, and specific exceptions guide the officer's discretion in those rare cases when an arrest would be appropriate. Those exceptions include when an arrest would further a legitimate investigative need, when an arrest is necessary to avoid imminent bodily harm, or when the officer reasonably believes that an accused will refuse to respond to a citation. These are reasonable and appropriate exceptions that adequately address legitimate law enforcement interests and provide

police with sufficient flexibility to respond to case-specific circumstances.

The American Bar Association's standards set forth a policy strongly favoring citation release whenever possible:

> It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

American Bar Association, *Standards for Criminal Justice*, § 10.2-1 (2d ed., 1980). The accompanying commentary notes that no substantive change was intended from the standard previously in force, which provided:

> A law enforcement officer having grounds for making an arrest should take the accused into custody or, having already done so, detain him further only when such action is required by the need to carry out legitimate investigative functions, to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will refuse to respond to a citation.

Id., History of Standard (quoting American Bar Association, *Standards Relating to Pretrial Release*, Standard 2.1 (1968)). The commentary explains that the purpose of this standard is to avoid a period of "wholly unnecessary incarceration" when possible. American Bar Association, *Standards for Criminal Justice*, Commentary, § 10.2-1 (2d ed., 1980). The commentary continues:

> [Standard 10-2.1] requires jurisdictions to establish a policy favoring citation release in all cases in which such release is not inconsistent with

> other legitimate law enforcement objectives. This policy is consistent with most other national standards, which recommend that jurisdictions use citations to the maximum extent possible. . . . [A]rrest ought not to be the automatic response to every criminal law violation. When arrest serves no legitimate purpose, police ought to be authorized – and in clear cases required – to utilize the less restrictive alternative of citation release. *Id.*

Whereas Standard 10-2.1 encourages citation use in general, Standard 10-2.2, entitled "Mandatory Issuance of Citation," is directed to police officers, and focuses on misdemeanor cases. It states in relevant part:

> (a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a misdemeanor should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.
>
> . . .
>
> (c) The requirement to issue a citation . . . need not apply and the defendant may be detained:
>
> (i) when an accused subject to lawful arrest fails to identify himself or herself satisfactorily;
>
> (ii) when an accused refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;
>
> (iii) when an otherwise lawful arrest or detention is necessary to prevent imminent bodily harm to the accused or to another;
>
> (iv) when the accused has no ties to the jurisdiction reasonably sufficient to assure

> accused's appearance and there is a substantial likelihood that the accused will refuse to respond to a citation; or
>
> (v) when the accused previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation.

Id., Standard 10-2.2.

Commentary following this standard observes that:

> for many defendants, arrest involves a needless and wasteful invasion of personal freedom. . . . [T]he decision concerning the necessity for arrest should not be left to the untrammeled discretion of the arresting officer. A standard that permits officers to arrest or not according to their personal assessment of a defendant is bound to lead to unequal enforcement of the laws.

American Bar Association, *Standards for Criminal Justice*, Commentary, § 10.2-2 (2d ed., 1980).

Standard 10-2.2 applies to *all* misdemeanors, even those punishable by over six months in jail. As the commentary observes, "[t]he penalties for misdemeanors are not so severe that a large number of defendants will be motivated to flee in order to avoid them, and the acts punished are not so serious that the public safety demands immediate incarceration." *Id.* The standard and its rationale apply with even more force to a case such as Petitioner's: a non-jailable traffic offense with a maximum penalty of a $50 fine.

Other prominent organizations have also written model standards supporting mandatory citation in most minor cases. The American Law Institute's Model Code of

Pre-Arraignment Procedure calls for issuance of regulations "designed to provide the maximum use of citations, so that persons believed to have committed offenses will be taken into custody only when necessary in the public interest." American Law Institute, *Model Code of Pre-Arraignment Procedure*, § 120.2(4) (1975).

The Uniform Rules of Criminal Procedure require citation release for all offenses in the absence of disqualifying conditions. National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure*, Rule 211(c). Arrest is permitted only when the offense involves violence or a risk of bodily injury; the offense is being committed in the officer's presence and the person will deliberately continue committing the offense unless arrested; the offense is punishable by incarceration and the person would not respond to a citation; or when arrest is necessary for protection of the arrestee or to obtain medical aid. *Id.*, Rules 211(c) (1)-(4) (1974).

The National Prosecution Standards of the National District Attorneys Association call for mandatory issuance of citations in lieu of arrest in all minor cases, with limited exceptions similar to those found in the ABA Standards. *See* National District Attorneys Association, *National Prosecution Standards*, § 10.2(B) (1977); American Bar Association, *supra*, Standard 10-2.2. The NDAA Standards go on to state that "[e]ach law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety." National Prosecution Standards, *supra*, § 10.2(C)(2).

Standards issued by the National Association of Pretrial Services Agencies (NAPSA) similarly indicate that

an officer should be required to issue a citation in lieu of arrest to all persons charged with misdemeanors unless certain circumstances exist. Those circumstances include most of the previously articulated exceptions, along with an exception for "legitimate investigative action." National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Release*, Standard II.A (1978). The accompanying commentary notes that citation release benefits "both the accused and the criminal justice system" and that "[c]osts to the jurisdiction are reduced in that no additional personnel are required to effect release and the police officer's time out of service is minimized by avoiding the need to transport the arrestee to a central booking facility." *Id.*, Commentary at 11.

Finally, the model standards adopted by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), a commission appointed by Attorney General John Mitchell in 1973, are similar to those of NAPSA. The NAC standards urge jurisdictions to adopt immediately policies requiring citation in lieu of arrest in minor cases, absent specified circumstances. National Advisory Commission on Criminal Justice Standards and Goals, *Corrections*, Standard 4.3 (1973).

For each of the above-discussed model standards, law enforcement interests were well-represented at the drafting table. Each committee that prepared the standards included prosecutors, as well as representatives from the police, sheriffs departments, and associations representing law enforcement interests, among their membership or on Advisory Committees, Task Forces, or review groups.

In summary, these model standards demonstrate that citation release is the appropriate law enforcement response in misdemeanor cases, absent any exceptional circumstances. The exceptions that have been carved out by these model standards are entirely reasonable and adequately serve all legitimate law enforcement interests. Moreover, the existence of these long-standing model standards makes clear that channeling a police officer's discretion in these ways is workable and causes no threat to law enforcement.

IV. Amici Urge This Court to Adopt a Rule Barring Custodial Arrest Absent Exceptional Circumstances in All Non-Jailable Misdemeanor Cases, in Keeping With the Model Standards, Workable Laws in Many States, and Good Police Practice

The model standards cited above offer excellent guidance to this Court. They have been in place for three decades without challenge or need for significant revision. They are thoughtful, workable standards – drafted with the input of law enforcement representatives – that meet the legitimate needs of law enforcement officials while respecting the rights of all citizens to be free from unreasonable arrests.

The exceptions set forth in the standards strike an appropriate balance between the rights of individuals and law enforcement interests. The policy in favor of citation in lieu of arrest is qualified by exceptions allowing for arrest in cases when there is a legitimate investigative need, a need to avoid imminent harm, or a substantial risk that the individual will not respond to a citation. Such legitimate law enforcement interests should be respected.

This Court need not attempt to specify all the exceptional circumstances that could justify a custodial arrest in a non-jailable misdemeanor case. It would be sufficient to rule that there may not be a custodial arrest in non-jailable misdemeanor cases absent exceptional circumstances, and that no such circumstances existed in this case. Lower courts can decide whether "exceptional circumstances" exist in future cases coming before them.

A ruling by this Court along these lines would strike a middle ground between allowing untrammeled police discretion and removing all police flexibility to deal with case-specific circumstances. If this clear standard is put in place, there would be no further need for a complicated balancing test with regard to these minor offenses.

Amici also do not believe that the Court should limit its ruling to traffic offenses. The standard adopted should apply to *all* non-jailable misdemeanor cases.[12] Of course, the need to apply such a rule in fine-only traffic offenses is even more compelling.

Several states already have arrest limitations at least as restrictive as those proposed here. Experience in these states shows that the limitations are reasonable and workable. In Minnesota, for example, the police have been required since 1975 to issue a citation in all misdemeanor cases with a maximum penalty of 90 days in jail or less "unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will

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[12] The proposed standard is less strong than the standards set forth in the models cited, many of which apply the policy to all misdemeanor cases carrying sentences of less than six months in jail. The Court may choose to adopt this broader approach instead.

fail to respond to a citation." Minn.R.Crim.P., Rule 6.01, subd. 1 (1999). The Rule's text and commentary indicate that arrest is almost never permitted for non-jailable misdemeanors. Moreover, these limits on the arrest power are enforced through exclusionary rules. *See State v. Martin*, 253 N.W.2d 404 (Minn. 1977) (non-jailable misdemeanors); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998) (misdemeanors). But, recognizing the fundamental proportionality principle discussed in Part II above, as well as the more frequent need for arrest in serious cases, the Minnesota rules grant much broader arrest powers for gross misdemeanor and felony crimes. Minn.R.Crim.P. Rule 6.01, subd. 2 (1999); *State v. Bauman*, 586 N.W.2d 416 (Minn. Ct. App. 1998) (gross misdemeanor charge, maximum penalty of one year in jail).

Other states also impose substantial limitations on arrest powers in minor cases.[13] Many states require issuance of a citation in lieu of arrest for most misdemeanor traffic violations. *See, e.g.*, Ind. Code § 9-30-2-5 (2000); Neb. Rev. Stat. § 60-684 (1999); N.M. Stat. Ann. § 66-8-123 (2000); S.D. Codified Laws Ann. § 32-33-2 (2000). A number of states also require citations for certain non-traffic offenses, *see, e.g.*, Alaska Stat. § 12.25.180(b) (1999) (infractions); Vt. R. Cr. P. 3(c) (1999) (misdemeanors). Moreover, standards adopted by numerous law enforcement agencies express a clear preference for the issuance

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[13] The most recent national survey found a large number of states with statutes encouraging the use of citations for traffic and other minor offenses. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 251 n. 189 (1989) Additional limits are found in state rules of procedure (e.g., the Minnesota and Vermont Rules cited in text).

of citations in lieu of arrest in most misdemeanor cases. *See, e.g.*, North Carolina Highway Patrol Policy Manual, Directive 1.1, Section III.A (1999) (barring arrest for all infractions); *id.*, Section III.B (limiting the circumstances in which arrests can be made in misdemeanor cases).

The experience of these states shows that strict limitations on police powers to arrest for minor offenses are workable in practice and pose no threat to law enforcement's ability to protect public safety and enforce the law.

CONCLUSION

Whether this Court applies a test balancing the individual and government interests involved, or relies on the proportionality requirement of the Fourth Amendment, a custodial arrest for a non-jailable misdemeanor is unreasonable and unjustifiable absent exceptional circumstances. No such circumstances existed in this case.

A ruling in petitioners' favor would simply recognize existing good law enforcement practice around the country. In contrast, a ruling in respondents' favor could cause unintended difficulties for those who deal with the administration of justice, especially jail managers, pretrial service agencies, and the courts.

This Court should reverse the decision below, and announce a standard barring custodial arrest in all non-jailable misdemeanor cases absent exceptional circumstances that reflect legitimate law enforcement needs.

Respectfully submitted,

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September 11, 2000

APPENDIX A:
INFORMATION ABOUT AMICI

Following are brief biographies of the individuals who have joined as amici in their individual capacities:

Dr. James Austin is the co-director of the Institute on Crime, Justice, and Corrections at the George Washington University in Washington, D.C. He has over 25 years of experience in criminal justice planning and research, and is one of the country's leading experts on correctional classification programs. He serves, or has recently served, as director for several large U.S. Department of Justice-funded research and evaluation programs. Some of his most recent studies have included national evaluations of "Three Strikes and You're Out" laws, the privatization of prisons, juveniles in adult corrections, and prison classification systems. He has also conducted evaluations of local jail systems (New York City, Los Angeles, Philadelphia, Chicago, and D.C.) and how they have been impacted by various law enforcement drug control programs.

David Bogard is an attorney with over 20 years of experience managing and advising on the operations of correctional facilities. He served as the Director of Corrections for Arlington County, Virginia from 1988 to 1994, and prior to that as Special Assistant to the Superintendent of the Philadelphia, Pennsylvania jail system. Mr. Bogard is a Commissioner on the Commission on Accreditation for Corrections of the American Correctional Association, where he reviews jail facilities nationwide to determine if they meet correctional standards. Mr. Bogard has also conducted jail management training for the

National Institute of Corrections-Jail Division, an arm of the United States Department of Justice. He has been an adjunct law professor at Howard University Law School. Mr. Bogard is currently a principal in the criminal justice planning firm of Pulitzer/Bogard and Associates, which consults on projects throughout the country dealing with jail operations and management.

James J. Fyfe is a Professor of criminal justice and senior public policy research fellow at Temple University, and is one of the nation's leading police scholars. Fyfe served as a New York City police officer, sergeant, and lieutenant during 1963-79, and held a variety of patrol, supervisory, training, and command positions. He was a Commissioner of the Commission on Accreditation for Law Enforcement Agencies, and helped to draft, review, and enforce that organization's standards. He has published five books and more than one hundred articles and chapters on police issues, and has testified as an expert on police issues in approximately 300 cases in state and federal courts in 33 states, the District of Columbia, and Canada, as well as in the U.S. Senate and House of Representatives, and in state and local legislatures across the U.S. Fyfe has consulted with police and law enforcement agencies throughout the world, and was a Senior Fellow of the Police Foundation, for which he drafted the amicus brief that was cited approvingly in the U.S. Supreme Court's majority decision in *Tennessee v. Garner*.

M. Kay Harris is an Associate Professor and former Chair of the Department of Criminal Justice at Temple University in Philadelphia. She is widely recognized as

one of the country's leading scholars on community corrections issues. Since 1991, she has worked with the City of Philadelphia and the local courts as a consultant in the federal court case dealing with overcrowding in the Philadelphia jail system. In the early 1970s, Professor Harris served as Assistant Director to the National Advisory Commission on Criminal Justice Standards and Goals (NAC), convened by Attorney General John Mitchell. In that position, she helped draft the NAC Standards on Corrections, including those standards dealing with citation release in lieu of arrest, which are of direct relevance in this case. She has also held positions with the American Bar Association, the Office of the United States Attorney General, the National Institute of Law Enforcement and Criminal Justice, and the Federal Bureau of Prisons. Professor Harris has provided technical assistance to corrections agencies throughout the United States, and has a long-standing commitment to helping criminal justice system stakeholders improve the administration of justice in their communities.

Alan Henry is Executive Director of the Pretrial Services Resource Center, a position he has held since 1984, and is widely considered the country's foremost expert on pretrial services programs. The Center is the national clearinghouse for information about pretrial laws, research, and program practices, and was established with funding from the United States Department of Justice in 1976. Besides directing the ongoing projects of the Center, Mr. Henry is a member of the American Bar Association's Task Force on Pretrial Release, serves on the Research Feedback Group of the International Association of Chiefs of Police, and chaired the Ad-Hoc Pretrial

Release Committee of the American Correctional Association. He has also served on the Board of Directors for the National Association of Pretrial Services Agencies (NAPSA), which drafted standards dealing with citation release in lieu of arrest. Those standards are of direct relevance in this case. Mr. Henry has conducted numerous training programs, and has helped the National Institute of Corrections develop training materials and provide technical assistance on jail overcrowding. The National Criminal Justice Association honored him for his "Outstanding Contribution to the Field of Court Administration" in 1986, and he continues to use his expertise to improve the administration of justice in the courtroom and in jails.

Michael Jacobson, Ph.D., was the New York City Corrections Commissioner from 1995 to 1997 and was the New York City Commissioner of Probation from 1992 to 1996. Before being appointed Probation Commissioner, he worked for nine years at the City Office of Management and Budget, where he was a Deputy Budget Director. He is currently a professor of sociology and criminology at the Graduate Center of the City University of New York and the John Jay College of Criminal Justice. Professor Jacobson also was an adjunct assistant professor at the Wagner School at NYU from 1985 to 1997 teaching courses on governmental budgeting, public policy analysis and organization theory.

Kenneth Kerle, Ph.D., has been the managing editor of the American Jail Association since 1986. He was asked to initiate the publication of American Jails magazine based on his experience in the field of corrections. His

book, "American Jails: Looking to the Future," (Butterworth-Heinemann, 1998) covers his jail odyssey to 48 states and visits to over 700 jails. Dr. Kerle has also visited over 150 prisons, jails, probation offices, police departments, and halfway houses in 20 foreign countries in Europe, Asia, and Australia. He has worked as a consultant to the National Sheriffs' Association (NSA), where he served as senior auditor of 66 jails in 20 states, producing full-length evaluation reports which measured jail operations policies and procedures against national accreditation guidelines. Dr. Kerle was also the co-author of the NSA publication "The State of Our Nation's Jails – 1982." He has written over 100 papers and articles about local corrections and lectures on the subject of jail in universities across the country.

Steve Martin is one of the country's leading experts on corrections litigation and correctional facility operations, with almost 30 years of experience working in the criminal justice system. An attorney and consultant, he is often called by the United States Department of Justice as an expert witness. He currently serves as a co-monitor for the federal court in the litigation involving Riker's Island in New York. Mr. Martin previously served as General Counsel to the Texas Department of Corrections and was the third-ranking official for that agency. He also previously worked as an Assistant District Attorney, a Special Assistant Attorney General in Texas, a U.S. Probation and Parole Officer, and a prison guard. Mr. Martin also held a gubernatorial appointment to the Texas Punishment Standards Commission, which revised the state's Penal Code and Code of Criminal Procedure.

Thomas Rosazza is an expert on police and correctional custodial care standards. The author of several training manuals, he has worked with such agencies as the American Correctional Association, the National Institute of Corrections, the American Medical Association Jail Standards Project, and Americans for Effective Law Enforcement. He conducts the American Jail Association's training course on jail intake procedures. Mr. Rosazza has held various positions in correctional administration, and has served as Assistant Executive Director of the Maryland Police and Correctional Training Commissions. There he began the development of the nation's first legislatively mandated training programs for state and local correctional personnel. He was also appointed Inspector General of Maryland's Commission on Correctional Standards, where he helped develop jail standards.

Eli B. Silverman, Ph. D, is Professor in the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice, City University of New York. He has previously served with the U.S. Department of Justice and the National Academy of Public Administration in Washington, D. C. He has served as consultant to numerous criminal justice agencies, and has expertise in the areas of police management, community policing, and comparative policing. His numerous publications on policing include: *NYPD Battles Crime: Innovative Strategies in Policing*, Northeastern University Press, 1999; "Reigning in the Police," *Criminal Justice Ethics*, Vol. 17, No. 2, Summer/Fall 1998; "The NYPD's New Strategies," with Paul O'Connell in *Crime and Justice in New York City*, Andrew Karmen, ed., McGraw Hill, 1998; "Below Zero Tolerance: The New

York Experience," in *Zero Tolerance Policing*, Roger Hopkins Burke, ed., Perpetuity Press, 1998; "Crime in New York: A Success Story," *The Public Perspective*, Vol. 8, No. 4, June/July 1997; and "Revolutionizing the Police: Fighting Crime in New York City," with Paul O'Connell, *Security Journal*, 9, 1997.

Arthur Wallenstein is the Director of the Montgomery County (Maryland) Department of Corrections and Rehabilitation. He previously served for 9 years as the Director and Jail Administrator of the King County (Washington) Department of Adult Detention, and for 13 years as Warden/Director of the Bucks County (Pennsylvania) Department of Corrections. Widely respected for his professionalism and knowledge about jail operations, Mr. Wallenstein was honored with the "Jail Administrator of the Year" Award by the American Jail Association in 1988. Mr. Wallenstein has also served on the National Institute of Corrections Advisory Board since 1994, and previously chaired the Board's Jails Committee. He has a particular interest in issues involving jail intake, mental illness, and health care, and is deeply concerned with the management problems caused by transient inmates.

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No. 99-1408

Supreme Court, U.S.
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In The

Supreme Court of the United States

GAIL ATWATER, AND MICHAEL HAAS, as next friend of Anya Savannah Haas and Mackinley Xavier Haas,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK, AND FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, NACDL has almost 10,000 members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military personnel and law professors. NACDL has members in all fifty states, and the American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates.

Among NACDL's objectives is to deter overreaching conduct by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. NACDL urges this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit as the lower court decision provides for vast officer discretion, permitting the overzealous officer to arrest any person he chooses for the pettiest of offenses. The Fourth Amendment is designed to constrain the discretion of the officer in the field and assure that his conduct in seizing citizens, when permissible, is reasonable. The Fifth Circuit decision provides neither assurance. Accordingly, NACDL files this brief on behalf of the Petitioners.

The Association of Federal Defenders ("AFD") was formed in 1995 to enhance the representation under the

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[1] Both parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. AFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. We believe that this mission calls upon us to join in asking the Supreme Court to reverse the lower court's decision in the instant case. Although it is a civil rights action rather than a criminal case, the instant case presents an issue of great importance in criminal law: whether the Fourth Amendment prohibits the use of custodial arrests for fine-only traffic offenses. A full custodial arrest invades one's privacy interests and one's dignity, and can often lead to criminal prosecution on other charges. It is in the interest of our clients to urge this Court to prohibit custodial arrests for ordinary traffic offenses.

SUMMARY OF ARGUMENT

This Court's Fourth Amendment doctrines prohibit an officer who issues a traffic citation from searching the motorist's vehicle absent consent or probable cause of other wrongdoing. *Knowles v. Iowa*, 525 U.S. 113 (1998). During the stop, the officer is further prohibited from patting down the motorist, or the interior of her vehicle, for weapons without reasonable suspicion to believe the motorist is armed. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968). If the search of the stopped motorist's car is to be based on consent, that consent must be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

The lower court's opinion in the instant case permits an officer, upon the mere observation of a traffic offense to take

the motorist into custody. *Atwater v. City of Lago Vista*, 195 F.3d 242, 244-45 (5th Cir. 1999) (en banc). As a result of this arrest, a search of the motorist's person is permitted as well as a search of the cabin of the automobile. *Chimel v. California*, 395 U.S. 752, 763 (1969); *New York v. Belton*, 453 U.S. 454 (1981). Neither consent nor probable cause stand as prerequisites to a complete search of a traffic offender's person or her car under the reasoning of the lower court. Contrary to this Court's holding that a traffic stop is analogous to *Terry* stop, and therefore limited in its length and scope, *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984), the lower court's decision permits every degree of intrusion associated with a full arrest to be a part of any traffic stop.

The lower court's opinion does not make a custodial arrest for the offense of failure to wear a seat belt mandatory, but allows an officer to use his discretion in determining whether the offense warrants a custodial arrest. This discretion permits an officer to search the person and vehicle any traffic offender of his choosing. The recently documented phenomenon of racial profiling has demonstrated that drug interdiction officers select persons of certain races in much higher frequency to search for drugs. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-354 (1998). Permitting officer absolute discretion to search any traffic offender for drugs will doubtless lead to the same sort of racial biases that have infected drug interdiction efforts thus far. The lower court places no barrier in the way of the discriminatory searches, but simply requires the officer to subject the motorist he desires to search to the indignity of a full custodial arrest.

The arrest the lower court permitted -- the arrest that would permit an officer to search any traffic offender of his choosing -- is simply forbidden by the Constitution. The common law, the starting point of this Court's Fourth Amendment analysis, permitted a misdemeanor arrest only

where the offender threatened a continuing affray if left at large. *See* Sir James Stephen, *History of the Criminal Law of England* 193 (1883).

The intrusion is further utterly unreasonable when the degree of the intrusion is weighed against the State's interest in the custodial arrest. *See Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (weighing state's interest in intrusion against the effect of the *manner* of seizure). The State may revoke the license of any traffic offender who fails to appear on the charge or fails to pay the fine. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 267 (1989). In the instant case, the maximum penalty for the offense was a $50.00 fine.

The lower court decision ignores the common law, fails to balance the individual's interest in liberty and privacy against the State's meager interest in this custodial arrest, and would eviscerate virtually all of this Court's doctrines dealing with the interaction of officers and traffic offenders.

ARGUMENT

I. STANDARDLESS DISCRETION TO ARREST FOR ANY TRAFFIC OFFENSE PERMITS AN OFFICER TO SEARCH THE PERSON AND VEHICLE OF ANY TRAFFIC OFFENDER OF THE OFFICER'S CHOOSING.

The power to make a custodial arrest for a misdemeanor traffic offense permits an officer to select, in his discretion, any minor offender, search her car and subject her to the indignity of an arrest and search of her person. This power

removes any constitutional constraint on officers performing traffic stops. This power permits personal and institutional prejudices about the sort of people who are transporting contraband to dictate who shall suffer the inconvenience and insult of a custodial arrest. This power, conveying unbridled discretion and a license to discriminate, cannot withstand constitutional scrutiny.

A. Arresting a Motorist for a Traffic Offense Amounts to an End-Run Around this Court's Doctrines Forbidding a Search Absent Consent or Probable Cause.

A traffic stop is analogous to a *Terry* stop and therefore the "stop and inquiry must be reasonably related in scope to their justification for the intrusion." *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) and *Terry v. Ohio*, 392 U.S. 1, 29 (1968)). An arrest, in lieu of a citation, for a misdemeanor traffic offense greatly expands the scope of a traffic stop allowing intrusions otherwise justified only on a showing of probable cause or the motorist's consent.

When an officer issues only a citation for a traffic offense, this Court permits the officer to search the vehicle only if the motorist consents or if the officer develops probable cause to suspect other wrongdoing. *See Knowles v. Iowa*, 525 U.S. 113 (1998) (forbidding search incident to arrest). Consent must be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973). Undue police coercion will not yield a valid consent. *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968). Limited intrusions to protect the officer from an armed motorist are permitted, but only if the officer has reasonable suspicion that the motorist is armed and the officer may intrude no more than necessary to discover weapons immediately in the reach of the motorist. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983);

Terry v. Ohio, 392 U.S. 1 (1968). If an officer may simply arrest any traffic offender, he may circumvent these doctrines merely by electing to subject the misdemeanant to a custodial arrest.

A search incident to arrest is permitted whenever a motorist is taken into custody, regardless of the seriousness of the offense. *United States v. Robinson*, 414 U.S. 218 (1973). The motorist's person may then be searched incident to arrest. *Chimel v. California*, 395 U.S. 752, 763 (1969). The entire cabin of the automobile may be searched incident to the arrest. *New York v. Belton*, 453 U.S. 454 (1981). Any part of the automobile may then be searched by officers if officers are instructed by their superiors, as a matter of routine, to inventory the items in that part of the automobile. *See Florida v. Wells,* 495 U.S. 1, 4-5 (1990); *United States v. Lumpkin,*159 F.3d 983, 987 (6th Cir. 1998) (permitting inventory search of engine compartment of vehicle); *United States v. Kordosky*, 921 F.2d 722, 723 (7th Cir. 1991) (permitting inventory search of locked sidewall compartment of trunk).

This Court recently and unanimously held that an officer may not perform a search incident to citation for an ordinary traffic offense -- that is, if an officer does not actually arrest a suspect, a search incident to arrest is unconstitutional. *Knowles v. Iowa*, 525 U.S. 113 (1999). This decision assumes that a custodial arrest for a misdemeanor traffic offense alone does not permit a custodial arrest.

This Court has held that where police have probable cause to arrest a suspect, it is constitutionally irrelevant whether the search incident to arrest occurs before or after the suspect is actually placed under arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). As Justice Harlan wrote,

> If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

Peters v. New York, 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

If the lower court's decision in the instant case, permitting an officer to arrest any traffic offender, accurately states the law then the officer may search any motorist, so long as he does so before issuing the citation. Under *Rawlings* and *Peters*, if an officer has the power to perform a custodial arrest, he may perform a search incident to arrest even before he announces that the suspect is in a state of custody. If the lower court opinion is correct then the officer who has seized a motorist, but has yet to issue a citation or perform a custodial arrest, has the power to take the motorist into custody and thus may conduct a search incident to arrest under *Rawlings* and *Peters*.

This Court's unanimous opinion in *Knowles* is eviscerated if a search incident to citation is forbidden after the issuance of a citation, but allowed moments before its issuance. The Court's analysis of the doctrine of search incident to arrest in *Knowles* further demonstrates it assumed that a custodial arrest for an ordinary traffic violation is constitutionally unreasonable. The State of Iowa argued that a search incident to a traffic violation was permitted because the stopped motorist might try to destroy evidence of another crime or destroy evidence relating to his identity. This Court found the possibility that an officer would stumble onto

evidence of an unrelated crime to be remote. The Court further found that "[a]s for the destruction of evidence relating to identity, if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Knowles*, 525 U.S. at 118. The Court thus signaled that an officer must have a basis for a custodial arrest -- a principled reason for a significant intrusion on the motorist's liberty and a search otherwise forbidden.

A debate raging in the lower courts illustrates the nearly universal acceptance of the idea that the Fourth Amendment limits an officer's power to intrude on the liberty of a mere traffic offender. The lower courts are deeply divided on whether an officer who stops a traffic offender may make inquiries unrelated to the traffic offense, specifically whether an officer may request consent to search for drugs absent suspicion of wrongdoing beyond the traffic infraction. The nature of the debate demonstrates the near-universal assumption that an arrest for a mere traffic offense is forbidden by the Fourth Amendment.

A majority of the courts hold that questions during a traffic stop must be limited to the purpose of the traffic stop, or to issues related to suspicion reasonably raised during the stop.[2] These courts rely upon this Court's doctrine that a

[2] *United States v. Holt*, No. 99-7150, 2000 U.S. App. LEXIS 21430 (10th Cir. Aug. 24, 2000); *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999); *United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998); *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States v. Finke*, 85 F.3d 1275, 1278-79 (7th Cir. 1996); *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States v. Perez*, 37 F.3d 510, 513 (9th Cir.1994); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *Mitchell v. United States*, 746 A.2d 877, 887-90 (D.C. 2000); *Almond v. State*, 530 S.E.2d 750, 752 (Ga. Ct. App. 2000); *State v. Myers*, 798 P.2d 453, 457 (Idaho Ct. App. 1990); *Lockett v. State*, 720 N.E.2d 762, 771 (Ind. Ct. App. 1999); *State v. McNaughton*, 924 S.W.2d 517, 523 (Mo.

traffic stop, like a *Terry* stop, is bounded in its scope and inquiry to the basis for the seizure. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). The remainder of the courts to consider this issue hold that an officer is free to ask whatever questions he pleases so long as the length of the traffic stop is not prolonged by the officer's questions.[3] These courts draw from this Court's teachings that questioning of a citizen at liberty is neither a search nor seizure. *See Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion). If police questioning is not a Fourth Amendment event, then it may not expand the scope of a seizure.

Either position assumes that there are limits on traffic stops, that an officer may not place a motorist in handcuffs and transport her to the police station for booking merely because the motorist committed a traffic offense. The majority view considers questioning unrelated to the stop that leads to a search to exceed the bounds of a legitimate traffic stop. The lower court's opinion in the instant case would not even require an officer to engage in questioning to obtain consent or probable cause to search the car -- a search could

Ct. App. 1996); *State v. Chapman*, 753 A.2d 1179, 1185 (N.J. Super. Ct. App. Div. 2000); *State v. Taylor*, 973 P.2d 246, 252 (N.M. Ct. App. 1998).

[3] *United States v. $404,905.00 in Currency*, 182 F.3d 643, 648 (8th Cir. 1999); *United States v. Jacobs*, 173 F.3d 426, 1999 U.S. LEXIS 2691 (4th Cir. Feb. 22, 1999); *United States v. Palomino*, 100 F.3d 446, 450 (6th Cir. 1996); *United States v. Davis*, 61 F.3d 291, 300 (5th Cir. 1995); *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *United States v. Grillo*, 40 F.3d 1245, 1994 U.S. App. LEXIS 30721 (4th Cir. Nov. 3 1994); *United States v. Shabazz*, 993 F.2d 431, 436-437 (5th Cir. 1993); *People v. Brown*, 72 Cal. Rptr.2d 793, 796 (Cal. Ct. App. 1998); *State v. Kremen*, 754 A.2d 964 (Me. 2000); *State v. Powell*, 5 S.W.3d 369, 376 (Tex. Ct. App. 1999); *State v. Gaulrapp*, 558 N.W.2d 696, 700 (Wisc. Ct. App. 1996). The Eighth Circuit is presently divided on this issue. *See $404,905.00 in Currency*, 182 F.3d at 648 (finding officer questioning during a stop does not implicate the Fourth Amendment); *Allegree*, 175 F.3d at 650 (holding that officer questioning during a traffic stop must be reasonably related to basis for the stop).

automatically flow from the officer's election of an arrest instead of a citation.

The minority view recognizes that police questioning may not prolong the length of a traffic stop, unless the officer has suspicion of wrongdoing beyond the traffic offense. The lower court's opinion would permit officers to extend the length of a traffic stop, absent suspicion of any wrongdoing beyond the traffic offense, not merely for the length of question unrelated to the offense, but for the length of time required for the motorist to be booked, fingerprinted, and released on bond.

The debate in the lower courts concerns the sort of questions an officer may ask in order to obtain probable cause or consent to search a traffic offender's car. The debate would be utterly preempted by the doctrine accepted by the lower court -- a passkey to search the person and vehicle of any traffic offender.

If an officer may conduct a custodial arrest for any traffic violation, then he need not obtain valid consent to search a car, he need only *decide* to arrest the minor traffic offender. His search then is not bounded by a search to discover weapons and is not predicated on any suspicion. And, according to the lower court's holding, the decision to arrest is entrusted to the unguided discretion of the officer who is aware that issuing a citation forbids a search of the car while an arrest, for the same offense, entitles a full search.

B. The Recently Documented Phenomenon of Profiling would be Permitted and Perpetuated by the Doctrine the Lower Court Announced.

The lower court's decision in the instant case gives officers the ability to select any minor traffic offender from the universe of traffic offenders, arrest the motorist and

search her automobile. This vast power will lead to even more egregious examples of the over-reaching by drug interdiction officers thoroughly documented in the lower courts and in the academic literature.

"Very few drivers can traverse any appreciable distance without violating some traffic regulation." B. James George, *Constitutional Limitations on Evidence in Criminal Cases* 65 (1973 ed.) *Whren v. United States*, 517 U.S. 806 (1996), permits an officer to stop any motorist who has committed any traffic infraction, however minor. Given the extensive regulation of motor vehicles and their operation, and the human imperfections of all drivers, the lower court's opinion permits an officer to select any motorist he desires, arrest her and thereby acquire the right to search the entire car.

Beyond an officer's interest in aggressively engaging in "the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 13 (1948), forfeiture laws have created a powerful incentive for officers to inspect as many automobiles as possible for the presence of drugs. Even a relatively small amount of unlawful contraband permits the forfeiture of an automobile carrying the contraband. The effect of this bounty to the state on an individual officer cannot be overstated. The financial existence of many of the drug interdiction units depends on the bounty from forfeiture, creating a powerful economic incentive for officers to search a many cars as possible for drugs. *See* Eric Blumenson and Eva Nilsen, *Policing for Profit: The Drug War's Hidden Agenda*, 65 U. Chi. L. Rev. 35, 76-84 (1998) (noting impact of forfeiture laws on patterns of prosecution).

In *United States v. Freeman*, 209 F.3d 464, 467 (6th Cir. 2000), Judge Clay observed "a troubling pattern or practice by some members of the Shelby County Sheriff's Department drug interdiction squad of stopping 'target' vehicles on

questionable probable cause grounds . . . in order to search for contraband." In *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995), the Sixth Circuit offered a caution to officers:

> we [have given] the green light to police officers to stop vehicles for any infraction, no matter how slight, even if the officer's real purpose was to hope that narcotics or other contraband would be found as a result of the stop[, and because] . . . we have extended this authority to *the broadest extent possible*, . . . we have a duty to see that it is not abused.

Freeman, 209 F.3d at 471 (citing *Mesa*, 62 F.3d at 162) (emphasis added).

Freeman noted a systemic pattern of police perjury and questionable traffic stops by a drug interdiction team in its efforts to search automobiles it had no basis to suspect contained contraband. 209 F.3d at 467-70 (Clay, J., concurring). Systemic abuses of the power to enforce traffic laws have been well documented. The incentive to search cars for drugs has further led officers to disproportionately stop and search minority motorists with no suspicion of wrongdoing beyond an ordinary traffic violation. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-354 (1998); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim. L. and Criminology 544, 560-69 (1997). In the search for drugs, officers have substituted race for suspicion. *See* Maclin, *supra* at 344-46.

To curb one well-documented pattern of racial profiling by police officers on the New Jersey Turnpike, the United States Department of Justice entered into a consent decree with the New Jersey State Police. In that decree, the New Jersey State Police were prohibited from allowing a drug dog

to sniff the exterior of an automobile for drugs unless there was a basis for using the dog and prohibited from requesting consent to search for drugs without a reasonable suspicion that drugs would be discovered. Consent Decree, *United States v. New Jersey*, Civ. No 99-5970, ¶¶ 28, 32-33 (MLC) (D.N.J.) (visited Sept. 10, 2000)<http://www.doj.gov/crt/split/documents/jerseycomp.htm>.

By limiting the ability of officers to search for drugs when they lack suspicion, the incentive of officers to stop motorists because of inarticable hunches about the sort of people who transport drugs is diminished. Substantial hurdles stand between the officer and the search he desires but may not legally justify. To even request consent, under the New Jersey Consent Decree, he must develop reasonable suspicion and even then the will of the motorist can prevent his search unless the officer develops probable cause during the seizure.

Permitting the mere observation of a traffic offense to allow an arrest of the motorist, thus a complete search of her person and car, has the opposite effect. Officers, under the lower court's holding, are permitted in their unguided discretion, to search the car of any person committing any traffic offense. Driven by a powerful economic incentive to discover contraband-carrying forfeitable cars, officers given the power to arrest and search any traffic offender could be expected to do no better than their predecessors. Arrests for traffic offenses, carrying with them the right to examine the contents of the motorists' automobiles, will turn on popular myths about the sort of people who deal drugs.

Responding to the Petitioner's argument in *Whren v. United States* that officers may use illegitimate factors to determine which infractions to prosecute, this Court held that practical realities prevented limiting officer discretion to prosecute any traffic offender. "[W]e think there is no

realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." *Whren*, 517 U.S. at 819. The scope of the seizure justified by the observation of an ordinary traffic infraction, however, may be readily limited by a common law rule -- an arrest for a misdemeanor is forbidden absent a threat that the misdemeanant will engage in an act of violence if left at large. Sir James Stephen, *History of the Criminal Law of England* 193 (1883) By limiting the officer's power to arrest traffic offenders, he is denied the ability to search traffic offenders absent suspicion or consent.

The common law rule therefore promotes enforcement of traffic laws based on an officer's assessment of which traffic offense warrants prosecution, rather than the selection of offenders based on hunches or profiles of the sort of people who might be committing more serious crimes. While not limiting the type of offender the officer may initially seize, the common law rule limits the scope of the officer's intrusion and investigation of an ordinary misdemeanant. And by removing the officer's power to automatically investigate crimes he has no reason to suspect, his initial seizure, limited to issuing a citation for the traffic offense, is far less likely to turn on his conceptions about the type of motorist transporting drugs.

II. THE COMMON LAW AT THE TIME OF THE FOURTH AMENDMENT'S ADOPTION AND THE MORES OF MODERN SOCIETY FORBID THE ARREST OF AN ORDINARY TRAFFIC OFFENDER.

This Court looks first to the common law to determine whether a governmental intrusion satisfies the Fourth Amendment. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). The common law did not permit a constable to make an arrest for a misdemeanor unless it was committed in his

presence and involved an affray that was likely to continue. Sir James Stephen, *History of the Criminal Law of England* 193 (1883). Changes in societal mores or technology permit deviations from the common law's starting point, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), but contemporary society finds an arrest for a misdemeanor repugnant and has used its computer technology to assure that traffic offenders may be prosecuted without resort to arrest. Contemporary legislation in many states has adopted the common law rule. Modern technology provides means of immediately determining a misdemeanant's identity and if his license is suspended in any jurisdiction for failure to appear, this information is immediately available to any officer in the country. Technological advancements and legislative indications of contemporary mores therefore demonstrate the modern efficacy of the common law limitation on an officer's power to arrest for a misdemeanor.

A. The Common Law Permitted a Misdemeanor Arrest Only Where an Affray was Likely to Continue.

The decisions of English courts prior to, and roughly contemporaneous with, the adoption of the Fourth Amendment illustrate that an officer was permitted to arrest only in the event of an affray that would continue unless the parties were arrested. *Regina v. Tooley*, 92 Eng. Rep. 349, 352 (K.B. 1710); *Cook v. Nethercote*, 172 Eng. Rep. 1443, 1445 (1835).

> The common law did not authorise the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace *either by an affray or by violence to an individual.* In such cases the arrest had to be made not so much for the purpose of bringing

> the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission.

Sir James Stephen, *History of the Criminal Law of England*, 193 (1883) (emphasis added).

Lord Holt observed in 1710 that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest." *Regina v. Tooley*, 92 Eng. Rep. 349, 352 (K.B. 1710). In 1835, Baron Alderson described an officer's power to arrest for a misdemeanor as limited to suppressing breaches of the peace that would recur unless the parties were arrested.

> If . . . there had been an affray, and that affray were over, then the constable had not and ought not have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace; and where a breach of the peace has been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from the magistrate.

Cook v. Nethercote, 172 Eng. Rep. 1443, 1445 (1835). Not surprisingly, Baron Alderson used the example of an affray as a breach of the peace that could continue absent an arrest. As one modern commentator has noted, "[t]his is to say that the arrest was not strictly part of the punishment process. It was mostly for the purpose of separating the combatants and detaining them to prevent further violence." Edward C. Fisher, *Laws of Arrest* 189 (1967).

Indeed this Court has recognized that the common law imposed limitations on an officer's power to arrest for a misdemeanor. "A peace officer . . . has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Carroll v. United States*, 267 U.S. 133, 157 (1925).[4]

The offense of driving without a seat belt is not one that threatens the public tranquility -- no violence is intended or occasioned by one who elects to travel the highway less than secure in the event of an accident. Certainly nothing beyond the fact the motorist was once caught without a seat belt suggests that even this minor crime will continue lest she is immediately removed from the roadway. The common law, the starting point in this Court's analysis of the reasonableness of an intrusion, simply did not contemplate an arrest for such a minor, non-violent misdemeanor.

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[4] Sir James Stephen, Lord Holt and Baron Alderman use the terms breach of the peace and affray interchangeably. Stephen, *supra,* at 193; *Tooley*, 92 Eng. Rep. at 352; *Nethercote*, 172 Eng. Rep. at 1445. Sir William Blackstone in his *Commentaries on the Laws of England* labeled an affray as one subset of the category of crimes under the umbrella "breach of the peace", a category also including libel, false prophesies and spreading false news about "any great man of the realm." 4 Blackstone, *Commentaries*, ch. 11, 142-53 (Garland 1978). The common law authorities on misdemeanor arrests, Holt, Alderman, and Stephen, often interchangeably use the terms affray and breach of the peace. These authorities nevertheless make clear only those misdemeanors that pose a continuing threat of public violence justify an arrest as opposed to summons.

B. Contemporary Legislation Demonstrates Society's Acceptance of the Common Law Limitations and Modern Technology Demonstrates the Sufficiency of the Limitation.

The common law provides the baseline rules regarding officer/citizen interactions. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). Changes in society may warrant reconsideration of the common law's baseline, changes in either the technology affecting police/citizen encounters or changes in societal views regarding police/citizen encounters. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In the instant case, modern technology and contemporary mores reinforce the common law's limitations on an officer's power to arrest for a misdemeanor. Modern technology has provided new means of assuring a misdemeanant's presence at trial without arrest and contemporary legislation demonstrates society's support for limits on an officer's power to arrest for a mere traffic infraction.

In *Garner*, this Court departed from the common law rule permitting deadly force to seize a fleeing felon. 471 U.S. at 11. The Court recognized that advances in technology and changes in public opinion compelled a departure. The effectiveness of modern weapons made use of a deadly weapon to apprehend a fleeing felon far more likely to kill than an attempt to seize a suspect with the weapons contemplated at the time of the common law rule. *Id.* at 11. The individual interest implicated by permitting the use of deadly force in the modern world was therefore more compelling than the interest implicated in a world where weapons were more likely to merely wound, or miss entirely. *Id.* Modern statutory limitations on the use of official force further illustrated that all reasonable means of seizing a non-violent fleeing felon at common law were not reasonable in modern times. *Id.* at 16-19.

Similarly, modern legislation and technology has made the use of a custodial arrest for a misdemeanor even less compelling than it was at the time it was forbidden by the common law. The Non-Resident Violator Compact has given a state the power to suspend the driver's license of a motorist of another state who fails to appear in court to answer a misdemeanor traffic charge. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temp. L. Rev. 221, 267 (1989). Computer technology permits an officer stopping such a motorist to rapidly learn the status of such motorist's license. *See* Darlene Cedrés, Note *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 Rutgers Computer & Tech. L. J. 391, 396-97 (1997) (noting that officers in patrol cars can access the National Crime Information Center and determine whether a driver's license has been suspended or revoked). Technology and legislation have given states a way of compelling appearance in misdemeanor traffic offenses unknown at common law -- at a time when the common law nonetheless prohibited a custodial arrest for misdemeanors.

Garner further looked to contemporary limitations on police use of force to determine whether deadly force ought to be permitted. Finding the modern trend to prohibit deadly force for non-violent fleeing felons, the Court found reasonableness should be assessed differently than it was under the common law. *Garner*, 471 U.S. at 16-19.

A growing number of states prohibit an officer from taking a misdemeanant into custody where the officer has no basis for believing the offender will fail to appear on the

charge and no basis for believing the offense will continue.[5] Limitations on the power to arrest for misdemeanors, common in many states, reveal that modern society finds it unreasonable to vest law enforcement officers with such unlimited discretion. Interestingly, Texas law, by statute, prohibits a custodial arrest for speeding. Tex. Trans. Code Ann. § 543.003 (West 1999). Speeding carries a higher fine under Texas law than the crime for which the petitioner was arrested, failure to wear a seat belt. And while speeding potentially endangers others, failure to wear a seat belt imposes a risk only to those who elect to violate the law.

III. THE MANNER OF A SEIZURE MUST BE REASONABLE IN LIGHT OF THE STATE'S INTERESTS

Probable cause to believe a motorist has committed a crime, however minor, does not end the inquiry into the reasonableness of the seizure. Probable cause permits a seizure, *Whren v. United States*, 517 U.S. 806, 813 (1996), but the manner in which the seizure is carried out must be reasonable in light of the government's interest in the seizure. *Garner*, 471 U.S. at 8. The lower court decision would permit an officer to seize a citizen in any manner he saw fit

[5] *See, e.g.* Ala. Code § 32-1-4 (1989); Colo. Rev. Stat. § 42-4-1707 (1997); Haw. Rev. Stat. Ann. § 286-10 (Michie 1998); Ind. Code Ann. § 9-30-2-5 (Michie 1997); La. Rev. Stat. Ann. § 32:391(A) (West 1989); Md. Code Ann., Trans. § 26-202(a)(2) (1999); Mass. Gen. Laws Ann. ch. 90 § 21 (Law. Co-op. 1994); Minn. Stat. Ann. §.169.91 (West Supp. 2000); Neb. Rev. Stat. § 29-435 (1995); N.M. Stat. Ann. § 66-8-123 (Supp. 1998); N.D. Cent. Code § 39-07-07 (1987); Ohio Rev. Code Ann. § 2935.26 (West 1997); Okla. Stat. Ann. tit. 22 § 1115.1(A) (West Supp. 2000); Or. Rev. Stat. § 133.310(1) (1997); S.C. Code Ann. § 56-25-30 (Law. Co-op. Supp. 1991); S.D. Codified Laws § 32-33-2 (1998); Tenn. Code Ann. § 40-7-118(b)(1) (1997); Vt. R. Crim. P. 3(a), (c) (Supp. 1999); Va. Code Ann. § 46.2-936 (Michie Supp. 2000); Wis. Stat. Ann. §§ 345.22 to .23 (West Supp. 1999).

so long as the officer had probable cause to believe that some offense -- however petty -- had been committed and the arresting officer did not actually kill or maim the suspect. *Atwater v. City of Lago Vista*, 195 F.3d 242, 245 (5th Cir. 1999) (*en banc*).

A. The State's Interest in Ensuring the Defendant's Presence at Trial and Protecting Society from a Criminal Suspect Does Not Justify a Custodial Arrest for a Fine-Only Misdemeanor.

Once a state has probable cause to believe a citizen guilty of a criminal infraction, the state's interests in taking custody of her consist of ensuring her presence at trial and ensuring that the citizenry is safe from her pending trial. *See United States v. Salerno*, 481 U.S. 739, 748 (1987) (recognizing these interests to justify pretrial detention). It has been recognized that the seriousness of the offense is a key indicator of the likelihood of the defendant appearing to answer the charges against her. Edward C. Fisher, *Laws of Arrest* 189 (1967). Further, this Court in *Salerno* recognized that the seriousness of the offense was a valid indicator of whether the defendant posed a threat to society if released pending trial. *Salerno*, 481 U.S. at 749. If a goal of punishment is incapacitation, society needs protection from the violent once their dangerous tendencies become evident.

For most modern misdemeanors, pretrial release is all but certain, making the relevant inquiry whether the misdemeanor suggests the defendant presents a danger she will not later present once booked and bonded out. The common law rule prohibiting misdemeanor arrest recognizes the legitimate interests of ensuring the offender's presence at trial and protecting society from the suspect. For ordinary misdemeanors, where the penalty is less than severe, the suspect is not likely to fail to appear as often the sanction for failure to appear exceeds the sanction for the underlying

misdemeanor. And, unlike the crimes of extortion and conspiracy to commit murder contemplated in *Salerno*,[6] the commission of a non-violent misdemeanor does not suggest that society needs immediate protection from the suspect.

Where, however, the state illustrates that the misdemeanant, despite the relative minor classification of his crime, does pose an immediate threat to public safety, the common law rule provides for his immediate incarceration. If the constable reasonably believed that the misdemeanant would continue to threaten harm to society if not arrested, then an arrest was permitted.

A modern example of a misdemeanor that itself suggests the necessity of incarceration is driving under the influence where the driver poses a risk to society because of his intoxication, a condition unchanged by his initial seizure. Modern statutes universally recognize an officer's right to arrest a motorist suspected of being intoxicated.[7]

Whren v. United States, 517 U.S. 806 (1996) stands for the rather unremarkable principle that any person who violates the traffic code may be forced to suffer the consequences established by the legislature, a very modest fine. *Whren* did not overrule this Court's holding that the degree of the intrusion occasioned to prosecute the offense must be balanced against the state's interest in that degree of intrusion.

[6] In *Salerno*, the defendants were charged with 35 acts of racketeering activity including fraud, extortion, gambling, and conspiracy to commit murder. *Salerno*, 481 U.S. at 743.

[7] *See, e.g.*, Tenn. Code Ann. § 40-7-118(c)(7) (requiring misdemeanor arrest "the person is so intoxicated that such person could be a danger to such person or to others.")

B. Absent a Fear for Public Safety or Inability to Otherwise Bring Offender to Justice, the Means of Seizure May Not Exceed the Punishment Authorized for the Offense.

As this Court recognized in *Garner*, at common law, burglary was a capital crime. *Garner*, 471 U.S. at 13. Imploring deadly force to stop an unarmed burglar therefore involved no greater consequence than the burglar would face if convicted. Modern laws provide much more lenient penalties for burglary and this Court accordingly held in *Garner* that the consequence of death was disproportionate to the state's interest in ensuring prosecuting of a non-capital felon who posed no risk to the community. *Id.*

Judge Easterbrook has recognized that an arrest for a misdemeanor offense amounts to more punishment than will typically be assigned by a neutral judicial officer. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986). A warrantless arrest for such an offense is a decision by a member of the law enforcement community to bring about a sanction exceeding that likely imposed by a neutral and detached judicial officer. When the offense is a fine-only misdemeanor, the law enforcement officer has visited a sanction upon a citizen exceeding even a judicial officer's *authority* to punish.

CONCLUSION

The decision of United States Court of Appeals for the Fifth Circuit misconstrued this Court's precedent regarding limitations on the manner of seizure an officer may perform once he has probable cause. A custodial arrest for the offense of failure to wear a seat belt is no more reasonable than the slaying of non-violent fleeing felon. The judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GAIL ATWATER, *et al.*,

Petitioners,

—v.—

CITY OF LAGO VISTA, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF TEXAS, THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE NATIONAL POLICE ACCOUNTABILITY PROJECT OF THE NATIONAL LAWYERS GUILD, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. The ACLU of Texas is one of its statewide affiliates. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of substantial concern to the ACLU and its members.

For over 35 years the Mexican American Legal Defense and Educational Fund (MALDEF) has fought to promote and protect the rights of Latinos in the United States. MALDEF's interest in Fourth Amendment issues stems from our Immigrant Rights and Access to Justice program areas, which currently monitor police conduct for compliance with the Fourth Amendment, and seek to address issues of racial/ethnic profiling by law enforcement agencies. MALDEF has a substantial interest in the proper resolution of this case, to ensure full protection of the rights of members of the Latino community.

The National Police Accountability Project of the National Lawyers Guild is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. The Project provides information and resources necessary for police misconduct litigation and support for legislative efforts to strengthen remedies for victims of police abuse.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Gail Atwater was driving her two children home from soccer practice one afternoon, at a speed of fifteen miles per hour through a residential neighborhood in Lago Vista, Texas. None of the three was wearing a seat belt. Atwater was stopped by City of Lago Vista Police Officer Bart Turek, who screamed at her that they had met before (several months previously Turek had stopped Atwater, apparently suspecting that her son was riding in the car without a seat belt, which turned out not to be the case) and that this time she was going to jail. *Atwater v. City of Lago Vista*, 165 F.3d 380, 382 (5th Cir. 1999).

Texas law provides that failure to wear a seat belt is a misdemeanor, subject to a maximum punishment of $50. Texas Transp. Code Ann. §545.413(d) (West 1999). Texas law allowed Officer Turek the discretion to issue a citation for this offense, *id.* §543.005, or to make a custodial arrest, *id.* §543.001. Neither the statute nor Lago Vista police department policy provides any guidelines or criteria for officers on how to decide between a citation and an arrest in such circumstances. 165 F.3d at 383.

Officer Turek chose to arrest Atwater for the seat belt offense. After what was described by witnesses as a "tirade" on his part, Turek took Atwater into custody, handcuffing her behind her back, and refusing her request that she be allowed to take her six-year-old daughter and four-year-old son to a neighbor's house two houses away from where they were standing, rather than have them accompany her to jail. *Id.* at 382.[2] Atwater was taken to the police

[2] When Turek demanded Atwater's driver's license and proof of insurance card, Atwater replied that those documents were in a purse stolen several days previously. Turek subsequently added charges of (continued...)

station in Turek's squad car, where she was required to empty her pockets, remove her shoes and glasses, and have her picture taken. She then spent about an hour in a jail cell before being taken to a magistrate who released her when she posted bond. Her children were spared the trip to the station house when a neighbor happened on the scene.

Atwater pleaded no contest to the seat belt charge. Because this incident caused Atwater and her children extreme emotional distress, requiring medication and counseling, they brought an action pursuant to 42 U.S.C. §1983, alleging, *inter alia*, that Turek's arrest was an unreasonable seizure under the Fourth Amendment. The U. S. District Court for the Western District of Texas granted the defendants summary judgment, a panel of the Fifth Circuit reversed, 165 F.3d 380, and the Fifth Circuit *en banc* reversed the panel, holding that the arrest was not unconstitutional under current law. 195 F.3d 242 (1999).

SUMMARY OF ARGUMENT

The Fourth Amendment prohibits custodial arrest for fine-only misdemeanors, at least in the absence of exigent circumstances. The Texas statute authorizing custodial arrest for any violation of its traffic code resembles the general warrants that were one of the principal motivating factors

[2] (...continued)
driving without a license and insurance card to the original seat belt charge against Atwater, but these charges were dismissed on the same day they were filed. 195 F.3d 242, 252 (5th Cir. 1999)(*en banc*) (Dennis, J., dissenting). Under Texas law, driving without proof of insurance is neither a crime nor an offense, *see id.*, and failure to carry or exhibit a driver's license as a first offense is a fine-only misdemeanor, *see id.*, so even if the after-the-fact additional charges were deemed to have been legitimate, Ms. Atwater's arrest was still, at most, for a fine-only misdemeanor.

behind the American Revolution and the drafting of the Fourth Amendment. *See* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION at 13-78 (1937).

The Fourth Amendment axiom that excessive police discretion can lead to arbitrary enforcement is demonstrated by Atwater's case; the potential for racially discriminatory enforcement, *see Illinois v. Wardlow*, 528 U.S. __, 120 S.Ct. 673, 677, 682 nn.9-10 (2000)(Stevens, J., dissenting), is even more alarming.

In *Whren v. United States*, 517 U.S. 806 (1996), the Court declined to question whether stops for traffic offenses are in fact pretexts to investigate suspected drug offenders. If there are no objective limitations on the more intrusive power to arrest, other than probable cause, states may, as some already have, authorize arrest for a vast array of offenses -- not only the entire traffic code, as in Texas, but littering, jaywalking and perhaps even parking violations. Law enforcement officers then have license to select anyone at all, wait for them to commit any one of thousands of possible infractions, and then place their target under arrest in order to conduct a search incident to arrest of the designated person and vehicle. Arrests would, in truth, become incident to the desired searches.

What is a "reasonable" seizure under the Fourth Amendment must be determined under the Court's usual balancing test, weighing the relative intrusion on individual interests against the state's legitimate needs. *Tennessee v. Garner*, 471 U.S. 1 (1985). The Fifth Circuit is incorrect in asserting that there is no need to apply the balancing test in this case, mischaracterizing dicta in *Whren*, 517 U.S. at 817, as assuming the result of a balance of interests not yet conducted. Presuming that the legislature may authorize officers to arrest for any trivial infraction, in addition to begging the question posed in this case, flies in the face of the

balance struck at common law, which authorized arrest only for fairly serious "misdemeanors" involving a breach of the peace, *see* 1 James F. Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (London, MacMillian 1883); Horace L. Wilgus, "Arrest Without a Warrant," 22 Mich.L. Rev. 541, 572-77 (1923-24). Current "misdemeanors" or minor offenses which have actually led to custodial arrests, like eating on the subway, failure to have a bell or gong on one's bicycle, littering, and "walking as to create a hazard," radically expand the arrest authority granted at common law.

Custodial arrest is highly intrusive. It carries with it not only the automatic right to search an arrestee and his or her vehicle incident to the arrest, but also the right to use some degree of necessary force to effect the arrest, to transport the person to the police station, to handcuff, book and fingerprint the person, to detain the person for a period of time (presumably up to 48 hours) before presentation to a magistrate, and to maintain a record of the arrest.

On the other side of the balance, the state ordinarily has no real need to take an individual into custody for a fine-only offense. In a case like Atwater's, there was no breach of the peace, no reason to fear that Atwater would abscond, and no need whatever to arrest rather than issue a summons.

The legislature's choice not to impose any jail time for a code violation is the best indication of the state's level of interest in taking custody of individuals who violate such prohibitions. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In other areas of constitutional interpretation, the Court has deferred to the legislature's classification of offenses as fine-only or not, predicating the existence of rights like the right to counsel or right to jury trial on whether or not an offense leads to incarceration. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970). Prohibiting custodial arrest for fine-only offenses in the absence of exigent circumstances would provide a clear and conven-

ient bright-line rule for courts and police to follow, respecting a line created by the legislature rather than subjecting every arrest to after-the-fact scrutiny by the courts.

Arrest may not be used as a summary punishment, imposing jail time that no legislature has authorized.

ARGUMENT

CUSTODIAL ARREST FOR A FINE-ONLY OFFENSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, IS AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. The History And Core Principles Of The Fourth Amendment Support Limitations On Custodial Arrest For Minor Offenses

Texas law delegates to every peace officer the power to arrest, and therefore to search incident to that arrest, *see United States v. Robinson*, 414 U.S. 218, 221-22 (1973), any person who has committed any infraction of its traffic code, Tex. Transp. Code Ann. §543.001 (West 1999), or any one of a broad array of other offenses. *See* Tex. Crim. P. Code Ann. §§14.01(a)-(b), 14.03 (2)-(4) (West 1998). No arrest warrant is required; no guidelines are provided.

This extravagant grant of discretionary authority is reminiscent of the general warrants the framers of the Fourth Amendment found so offensive. In fact, it was exactly such excessive delegations of the power to search and seize (like the statutes authorizing writs of assistance) that the Fourth Amendment was intended to prevent. *See* Jacob Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT 30-42 (1966). It is by now familiar history that the framers' dismay at statutes granting such general preroga-

tives was one of the principal motivating factors, both for the Revolution and the creation of the Fourth Amendment itself. *See* Lasson, *supra*, at 13-78 (events during the thirty years preceding the drafting of the Fourth Amendment inspired the framers to elevate the principle of "reasonableness" to one of constitutional significance). The decisions of this Court consistently identify excessive police discretion as the central concern of the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 583-85 (1980). "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). *See also Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976); *Camara v. Municipal Court*, 387 U.S. 527, 532-33 (1967).

Recent history underscores the need to respect the Fourth Amendment's traditional concerns by imposing appropriate limitations on the discretion to arrest. In *Whren v. United States*, 517 U.S. 806, the Court declined to examine whether stops for traffic offenses were in fact pretexts to investigate suspected drug offenders, believing that it would be inappropriate as part of Fourth Amendment analysis to explore the subjective motivation of individual officers. If the Fourth Amendment is also construed as not imposing any objective limitations on the arrest power, other than probable cause, any state or municipal legislature may authorize custodial arrest for any "offense" at all, no matter how trivial, and the potential for abuse of discretion and selective enforcement is magnified exponentially.

This is more than a hypothetical concern. Infractions today's legislatures have already constituted as arrestable offenses, and which have actually led to full custodial ar-

rests, include, in addition to the Texas seat belt offense, eating on the subway, *see Fisher v. Washington Met. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982); failure to have a bell or gong on one's bicycle, *see Thomas v. Florida*, 614 So.2d 468 (Fla. 1993); failure to obtain a license for a telemarketing business, *see Ricci v. Village of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), *cert. dism'd as improvidently granted*, 523 U.S. 613 (1998); littering, *see United States v. Herring*, 35 F.Supp.2d 1253 (D. Or. 1999); and "walking as to create a hazard," *see Barnett v. United States*, 525 A.2d 197, 198 (D.C.Ct.App. 1987).

For some overzealous officers, the temptation to use this blanket authority to trawl for drug offenders could be overwhelming. Officers in permissive jurisdictions could target anyone at all, watch their target until she or he committed some infraction, even if only littering or jaywalking, and then claim the right to perform a search incident to a strategic arrest of the individual, and in cases of traffic offenses, search the individual's vehicle as well. If the opportunity to declare virtually anyone to be under arrest is too readily available, the search incident to arrest doctrine is effectively turned on its head, with arrests becoming incident to the real goal of suspicionless searches.

The facts of *Thomas v. Florida*, 614 So.2d 468, are instructive and alarming. Carl Thomas was riding his bicycle through a predominantly black neighborhood in Orlando known for drug activity. A local officer, apparently having no objective reason to stop Thomas on suspicion of any other criminal activity, arrested him for the offense of riding a bicycle not equipped with a bell or gong (under a city ordinance whose dubious validity under Florida law had not yet been litigated, apparently because it was so rarely enforced). Conducting a search incident to this ingenious arrest, the officer found a handgun in Thomas's pocket. *Id.* at 469. *Whren* instructs us not to inquire into the officer's

reason for suddenly deciding to enforce this vestigial ordinance.

While Atwater's case proves the conventional Fourth Amendment wisdom that excessive delegations of arrest authority can lead to arbitrary enforcement, or enforcement out of personal vendetta,[3] Thomas's case raises the specter of the rampant discriminatory enforcement that can take place in the absence of objective limits on legislative grants of arrest power, with its concomitant search power. Sadly, the fear that excessive grants of discretion will lead to racially discriminatory law enforcement is more than hypothetical. *See Illinois v. Wardlow*, 120 S.Ct. at 682 nn.9-10 (Stevens, J., dissenting). Historical prejudices against minorities, as well as more recent cultural prejudices against immigrants, find expression in unbridled discretion. Courts across the country are increasingly recognizing claims based on the practice of racial profiling, as that issue moves to the forefront of national consciousness.[4] It is not only in border

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[3] Judge Garza took judicial notice on the basis of his sixty years as a Texas lawyer that the usual procedure in Texas traffic stops is for the officer to issue a citation, 195 F.3d at 246 (Garza, R., J., dissenting), and concluded that Atwater was singled out for improper reasons.

[4] *See Martinez v. Village of Mount Prospect*, 92 F.Supp.2d 780 (N.D. Ill. 2000)(approving settlement agreement including enactment of policy banning racial profiling); *United States v. State of New Jersey*, No. 99-5970 (D.N.J.), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (consent decree resolving U.S. Department of Justice racial profiling claim against New Jersey State Police); *Rodriguez v. California Highway Patrol*, 89 F.Supp.2d 1131 (N.D. Cal. 2000)(targeting of African-American and Latino drivers); *National Congress of Puerto Rican Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999)(*Terry* stops targeting African-American and Latino individuals on the basis of race and national origin). *See generally* David Cole, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Randall Kennedy, RACE, CRIME, AND THE LAW

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states like Texas that local police, frequently responding to community prejudices, single out people of Mexican appearance in order to check their immigration status. *See, e.g., Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 95 F.Supp.2d 723, 737 (N.D. Ohio 2000). Custodial arrest, as a manner of seizure and as a means of initiating and subjecting individuals to process, must be subject to a reasonableness inquiry that balances governmental interests with an individual's Fourth Amendment interests, *see Atwater v. City of Lago Vista*, 195 F.3d at 247 (Garza, R., J., dissenting), 246-47 (Wiener, J., dissenting), 254 (Dennis, J., dissenting), if the courts are not to abdicate the responsibility of ensuring reasonably evenhanded law enforcement.[5]

The fear that legislatures will condone and encourage suspicionless searches is also more than hypothetical. The Iowa legislature, for example, in a candid attempt to spare individuals the burden of custodial arrest in circumstances where what the legislature really wanted was to allow otherwise impermissible searches of cars, tried to confer the power to search on all officers who stop people for traffic offenses, regardless of whether or not they conduct an arrest. Now that the Court has invalidated that effort to sever the arrest and its incident search, *Knowles v. Iowa*, 525 U.S. 113 (1998), state or municipal legislatures sharing the Iowa legislature's goal of permitting searches not based on probable cause must authorize, and insist on, custodial arrests rather than traffic citations. State or local jurisdictions will be encouraged to emulate Texas by permitting arrest for traffic offenses, perhaps even for parking violations, as a predicate for allowing their officers to conduct otherwise unjustifiable searches.

The searches and arrests in such cases must be deemed unreasonable within the meaning of the Fourth Amendment, both because of the excessive, unreasonable delegation of discretion, and because, on balance, the state's interest in enforcing minor offenses does not reasonably outweigh the individual's interest in liberty, privacy, and dignity.

B. The Reasonableness Of Custodial Arrests For Minor Offenses Must Be Judged Under The Court's Fourth Amendment Balancing Test

When Gail Atwater was transported to the police station, she was subjected to a full custodial arrest. *See Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). Because this Court has always recognized that custodial arrest is the gravest intrusion on an individual's liberty and privacy, it has strictly observed the requirement that any arrest must be based on probable cause. *Id.* at 208. The Court has also found arrests to be unreasonable, even when based on probable cause, in a variety of cases, sometimes requiring arrest warrants as a precondition to a valid arrest, *see Payton v. New York*, 445 U.S. at 585 ("a warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable"); *Welsh v. Wisconsin*, 466 U.S. 740 (warrantless home arrest for misdemeanor requires particularly exigent

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[4] (...continued)
(1997); David A. Harris, "The Stories, The Statistics, and the Law: Why 'Driving While Black Matters," 84 Minn.L.Rev. 265 (1999); David Cole, "Race, Policing, and the Future of Criminal Law," 26 Hum.Rts. 2 (Summer 1999); Dorothy E. Roberts, "Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing," 89 J.Crim.L. & Criminology 775 (1999).

[5] The *Whren* Court suggested that any problem with discriminatory enforcement could be addressed through litigation under the Equal Protection Clause. *Id.* at 813. For an explanation of why equal protection claims are not an adequate substitute for control over excessive police discretion, *see* Brief *Amicus Curiae* of the American Civil Liberties Union in Support of Petitioners at 10-11 n.4, *Whren v. United States*, 517 U.S. 806 (1996)(No. 95-5841).

circumstances); *see also Steagald v. United States*, 451 U.S. 204 (1981)(search warrant required for arrest in another's home), and sometimes imposing limitations on the method of arrest, *see Tennessee v. Garner*, 471 U.S. 1 (limitation on use of deadly force in arrest); *Wilson v. Arkansas*, 514 U.S. 927 (1995)(knock-and-announce limitation on execution of warrants); *Richards v. Wisconsin*, 520 U.S. 385 (1997) (same).

As the Court has explained on many occasions, whether or not an arrest is reasonable must be determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. at 8. *See also United States v. Place*, 462 U.S. 696, 703 (1983); *Winston v. Lee*, 470 U.S. 753, 760 (1982); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Delaware v. Prouse*, 440 U.S. at 654; *United States v. Martinez-Fuerte*, 428 U.S. at 556-62.

While the Court has not yet addressed the question of what limitations the Fourth Amendment imposes on the power to arrest for minor offenses, a number of Justices have expressed concern about the need to limit the power to arrest under such circumstances. *See Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973)(Stewart, J., concurring)("a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting); *cf. Maryland v. Macon*, 472 U.S. 463, 471 (1985)("[w]e leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials")(opinion of the Court by O'Connor, J.); *Welsh v. Wisconsin*, 466 U.S. at 749 n.11 (leaving open the question of whether warrantless arrest in the home for a nonjailable

offense is ever reasonable, even if exigent circumstances exist)(opinion of the Court by Brennan, J.). Three Terms ago, the Court granted *certiorari* in *Ricci v. Village of Arlington Heights*, 116 F.3d 288, to consider the question of whether petitioner's arrest for violation of a fine-only municipal ordinance by operating a telemarketing business without a license was an unreasonable seizure, but subsequently dismissed *certiorari* as improvidently granted, 523 U.S. 613 (1998)(No. 97-501).[6]

The *en banc* majority below took as dispositive of the *certiorari* question in this case, and in *Ricci*, dicta from the Court's decision in *Whren v. United States*, 517 U.S. at 817, commenting that if an arrest is based on probable cause, "with rare exceptions . . . the result of that balancing is not in doubt." *See* 195 F.3d at 243. While it is understandable that lower federal and state courts have been reluctant to venture into territory not previously charted by this Court, the dicta in *Whren* cannot be read as obviating the need to balance the state and individual interests in this case. First, what *Whren* found to be constitutionally reasonable was only a *stop* based on probable cause that a traffic offense was being committed, not an arrest. Whren was not placed under arrest until the officers observed illegal drugs in plain

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[6] The Court has left this question open for so long that some observers have assumed that the Court's inaction is an implicit rejection of the argument that the Fourth Amendment imposes limitations on the arrest power beyond probable cause. *See, e.g.*, Wayne R. LaFave, SEARCH AND SEIZURE §5.1(c) at 23 (3d ed. 1996); *Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990). Even if they do not simply assume the Fourth Amendment to be so limited, some state and lower federal courts have announced that they prefer to await the Supreme Court's lead rather than engaging in independent analysis of what common law requirements the Fourth Amendment incorporates with respect to arrest. *See, e.g., Fisher*, 690 F.3d at 1139 n.6; *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 570 (Wis. 1989).

view during the traffic stop. 517 U.S. at 809. Second, although the Court remarked that the balancing analysis has been reserved for "extraordinary" or "extreme intrusions, *id.* at 818, the Court went on to list cases in which various limitations, usually gleaned from common law, were added to what had previously been assumed by the Court to be reasonable arrests.[7] Overreading the *Whren* dicta simply begs the question posed herein by assuming the result of a balancing not yet conducted.

The offenses for which custodial arrest was permitted at common law -- typically serious offenses involving breach of the peace, *see infra*, at pp.19-20 -- could indeed be presumed, on balance, to be reasonable occasions for custodial arrests. The state's interest in restoring the peace after a disruptive infraction could reasonably be viewed as presumptively outweighing the individual's interest in remaining free. Whether the state is entitled to the same presumption where an arrest is for failing to wear a seat belt or operating a business without a license is a question that has never been considered by this Court. It is because the world of regulatory offenses has proliferated in a manner the common law could not have imagined that it has become necessary for the courts to decide whether arrests for petty offenses are reasonable, instead of assuming that they are simply because a legislature or city council has granted the prerogative to arrest. Legislatures are not the final arbiter of what constitutes a reasonable arrest practice. *See Knowles v. Iowa*, 525 U.S. 113.

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[7] Before *Payton v. New York* was decided, for example, the Court declared that it had never "invalidated an arrest based on probable cause because the officers failed to secure a warrant," *see, e.g., Gerstein v. Pugh*, 395 U.S. 103, 113 (1975), and that probable cause was thus the only requirement for a valid arrest.

C. The Intrusiveness Of A Custodial Arrest Outweighs The State's Interests In Conducting Such Arrests For Fine-Only Offenses

Every arrest is a serious intrusion on individual liberty, privacy, and dignity. Incident to any lawful arrest, as described above, police may, with no additional showing, conduct a full search of the individual being arrested, including containers on their person, *United States v. Robinson*, 414 U.S. at 221-22, even for minor offenses and where there is no evidentiary purpose, *Gustafson v. Florida*, 414 U.S. 260 (driving without a license), and may search the passenger compartment, including containers, of an arrestee's vehicle, *see New York v. Belton*, 453 U.S. 454 (1981).

An arrestee, like Gail Atwater, may be publicly humiliated by being led away by the police, in handcuffs, in front of neighbors or strangers, and then frightened by being transported to the station house, where he or she may be booked and fingerprinted, and then detained without seeing a magistrate for up to 48 hours, and possibly even longer. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Petitioner Atwater was held for only one hour; others less fortunate could be held for a substantially longer period of time, particularly if they are unable to secure bail or post a demanded bond.[8] Like Atwater, an arrestee may also have dependent children who might be forced to share their parent's humiliating and traumatic experience, or left without adequate care.[9]

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[8] This practice would have severe and potentially unconstitutional consequences for poor people. *See Tate v. Short*, 401 U.S. 395 (1971).

[9] There is little question in this case as to whether probable cause for the arrest actually existed -- Atwater admitted that she and her children were not wearing seatbelts, as the officer had personally observed. Permitting

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In addition to the serious intrusion on the arrestee's liberty and dignity, an arrest can continue to compromise privacy interests. Even in cases resulting in acquittal or dismissal, arrest records may be maintained and disseminated, further damaging the individual's reputation. *See Paul v. Davis*, 424 U.S. 693 (1976); Donald L. Doernberg & Donald H. Zeigler, "Due Process, Versus Data Processing: An Analysis of Computerized Criminal History Information Systems," 55 N.Y.U.L.Rev. 110, 114 (1980).

No legitimate interest of the state or city, on the other hand, was served by Atwater's arrest that would not have been as well served by issuance of a citation. Atwater did not create or threaten to create a breach of the peace. She did not refuse to identify herself or attempt to evade Officer Turek. She did not refuse to fasten her own and her children's seat belts when apprehended by Officer Turek; the officer did not request that she do so because he decided so precipitously to place her under arrest. The state's interest in assuring a defendant's presence for further proceedings can be satisfied in fine-only cases by issuing a summons for a code violation.[10] The less serious the offense, the less likely a defendant is to abscond. *See Welsh*, 466 U.S. at 759 (White, J., dissenting). In light of Atwater's unimpeachable roots in her community and the nature of her offense, it can scarcely be argued that the state had an interest in preventing her from absconding in order to avoid a $50

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[9] (...continued)
custodial arrest to be authorized for a vast array of minor infractions, however, would also allow arrests and two-day detentions even in cases where the existence of probable cause is highly questionable.

[10] *See* ALI Model Code of Pre-Arraignment Procedures §120.2 (1975); Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses," 62 Temple L.Rev. 221, 266-69 (1989).

fine. There was simply no legitimate need for the arrest.

The fact that this offense was deemed by the state legislature not to warrant any sentence of incarceration is an important factor affecting the balance of interests and rendering the arrest unreasonable. In *Welsh v. Wisconsin*, 466 U.S. at 750-53, the Court held that the gravity of an offense is a factor to be weighed in determining whether sufficient exigent circumstances exist to allow a warrantless arrest in the home. The fact that Welsh was being arrested for a nonjailable traffic offense, *see id.* at 742, was found to outweigh the state's interest in promptly entering his home in order to preserve evidence of his offense (driving while intoxicated). In fact, the Court left open the question of whether the Fourth Amendment should be interpreted to pose an absolute ban on warrantless home arrests for certain minor offenses, *id.* at 749 n.11, regardless of the existence of exigent circumstances. Rather than engage in the judicial evaluation of the severity of offenses that the dissenters in *Welsh* found objectionable, *id.* at 756, the Court can accept the legislature's own ranking of the severity of the offense and include that assessment in the balance. The state has defined the level of its own interest through its penalty decision. *See* pp.27-29, *infra*.

Respondents cannot argue that the purpose of this arrest was to attempt to deter Atwater from committing future violations by punishing her with a taste of custody, because decisions about what is an appropriate punishment must be made by a representative, politically accountable body. *Cf. Harmelin v. Michigan*, 501 U.S. 957, 962 (1991)(on legislative prerogative to decide punishment levels). In this case the legislature decided not to make any form of incarceration available as a sanction for seat belt violations, *see* Tex. Code §545.413(d), but then nevertheless delegated to its peace officers the power to single out individuals to be sent to jail rather than given a summons, *id.* at §§543.001,

543.005. Judge Wiener, dissenting from the *en banc* decision below, remarked that Officer Turek had acted as "a one-person cop cum judge cum jury cum executioner." 195 F.3d at 250. He could aptly have added "cum legislature."

An exigent circumstances exception to the rule that custodial arrest is not generally permitted for fine-only offenses would be more than sufficient to deal with those cases where a state does have a legitimate reason to arrest an individual for such an offense, perhaps because the individual is threatening a breach of the peace, or refuses to identify herself.[11] *See* Thomas R. Folk, "The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests," 48 U.Cin.L.Rev. 321 (1979)(arguing that custodial arrest for minor offenses should be confined to limited situations like these). What exigent circumstances would justify a custodial arrest for a fine-only offense is not a question that arises in this case, however, because there was no claim of exigency with respect to petitioner Atwater's arrest and no basis for any such claim.

D. Common Law Tradition Supports Prohibition Of Custodial Arrest For Fine-Only Offenses

This Court has often said that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). This is not a case where logic must defer to history, *see United States v. Watson*, 423 U.S. 411, 429 (1976)(Powell, J., concurring), for logic is supported by history.

At common law, a summons procedure rather than custodial arrest was customarily used for minor offenses not constituting a breach of the peace. *See* Julius Goebel, Jr. & T. Raymond Naughton, LAW ENFORCEMENT IN COLONIAL NEW YORK 417 (1944)(Patterson Smith Reprint Series, 1970); Salken, *supra*, at 258-59 and authorities cited therein. Warrantless custodial arrest[12] was authorized for "misdemeanors" only if they constituted a breach of the peace and occurred in the officer's presence. *See* Stephen, *supra*, at 193 ("The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual"); 1 Joseph Chitty, A PRACTICAL TREATISE ON THE CRIMINAL LAW 15 (1816)(Garland Publishing, Inc. 1978)("no person can, in general, be taken into custody without warrant, for a mere misdemeanour unattended with violence, as perjury or libel"); 4 William Blackstone, COMMENTARIES *289; Matthew Hale, PLEAS OF THE CROWN: A METHODICAL SUMMARY 92 (1678)(P. R. Glazebrook ed., Professional Books Ltd. 1972)("in case of any other breach of the peace, the Constable may imprison the party in the Stocks, in the Goal [sic], or in his House, till he can bring him before a Justice of the Peace"); Edward C.

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[11] In many cases where an individual's conduct threatens a breach of the peace or defies an officer's authority, that individual might be subject to arrest for a separate offense like disorderly conduct, obstruction of justice, or refusal to identify oneself, depending on the legislature's treatment of those offenses.

[12] This case does not raise the question of whether obtaining an arrest warrant would permit an officer to conduct a custodial arrest for a fine-only misdemeanor, or for an offense not constituting a breach of the peace. The *en banc* court below, in fact, found that Atwater had procedurally defaulted any claim of a right to an arrest warrant. 195 F.3d at 245 n.3.

Fisher, LAWS OF ARREST 125 (1967); Wayne R. LaFave, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 17 (1965); William A. Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment," 58 Mo.L.Rev. 771, 774-75 (1993). Arrest for minor offenses (those triable by a magistrate alone and not by a jury) was not sanctioned for the purpose of apprehending suspects, but rather to restore the peace. Stephen, *supra*, at 193. According to other sources, so great was the American colonists' antipathy to unnecessary custodial arrests that even magistrates were required, in cases involving only such minor offenses, to proceed by summons rather than by issuing an arrest warrant. Floyd Feeney, THE POLICE AND PRETRIAL RELEASE 12 (Lexington 1982); Goebel & Naughton, *supra*. As one recent history concluded, the framers of the Fourth Amendment would have perceived peace officers as possessing little "significant ex officio discretionary arrest or search authority." Thomas Y. Davies, "Recovering the Original Fourth Amendment," 98 Mich.L. Rev. 547, 640 (1999).

The "misdemeanors" for which common law allowed custodial arrest were generally serious offenses, including assaults and other dangerous and disruptive acts, or public disturbances. *See* Wilgus, *supra*, at 572-77 (listing offenses covered); Davies, *supra*, at 630 & n.220. As new offenses were created and the domain of the criminal law expanded, some statutes eroded the common law and extended the arrest authority to what Wilgus termed "public torts," 22 Mich.L.Rev. at 576-77, and even to traffic violations like petitioner's. *See* Fisher, *supra*, at 128; Schroeder, *supra*, at 775; Sam B. Warner, "Uniform Arrest Act," 28 Va.L.Rev. 315, 331-36 (1942). It is these new regulatory and quasi-civil offenses, mostly unknown to the common law, that are likely to be punishable only by fine, like petitioner's infraction. Use of the arrest power for such offenses, even

if authorized by state legislatures, constitutes a dramatic expansion of common law arrest authority.[13] The framers of the Fourth Amendment, offended by undue grants of discretion to search and arrest for common law offenses, did not have occasion to consider whether they would have been equally offended by random or politically motivated arrests for a wide variety of trivial matters, because such arrests were not within their experience. It seems likely that they would have found such practices as least as objectionable.

A number of contemporary statutes share at least some of the approach of the common law, seeking to limit custodial arrest for nonfelonies to instances where there is an actual need to arrest. Some states have explicitly codified the common law requirement that warrantless arrests may only be conducted for misdemeanors occurring in the presence of the officer if they are breaches of the peace.[14] Many other states retain the common law rule permitting warrantless arrests for misdemeanors only if they are committed within the arresting officer's presence, without explicitly mentioning the common law's breach of the peace

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[13] *See* Francis H. Bohlen, "Arrest With and Without a Warrant," 75 U. Pa.L.Rev. 485, 491 (1927)(finding "appalling" the notion that the traditional common law power to arrest for breaches of the peace might be expanded to municipal ordinance violations).

[14] *See* Miss. Code Ann. §99-3-7(1) (1999); W. Va. Code §62-10-6 (2000)(equivalent limitation on constables, not sheriffs). Some statutes limit the right to arrest to "public offenses" committed within the officer's presence, *see* Ala. Code §15-10-3(a)(1) (1999)("public offense" or "breach of the peace"); Ark. Code Ann. §16-81-106(b)(2) (Michie 1999); Cal. Penal Code §836(a)(1) (West 2000); Idaho Code §19-603(1) (1999); Iowa Code Ann. §804.7(1) (West 1999); Minn. Stat. Ann. §629.34(1)(c)(1) (West 1999); Nev. Rev. Stat. Ann. §171.124(1)(a) (Michie 1999); N.D. Cent. Code §29-06-15(1)(a) (1999); Okla. Stat. Ann. tit. 22, §196(1) (West. 1999); S.D. Codified Laws §23A-3-2(1) (Michie 2000); Tenn. Code Ann. §40-7-103(a)(1) (1999)("public offense" or "breach of the peace"); Utah Code Ann. §77-7-2(1) (1999).

requirement, but incorporate some of the spirit of that limitation by allowing arrest for misdemeanors committed outside an officer's presence only for designated offenses, usually more serious misdemeanors entailing violence or a threat of violence.[15] *See* LaFave, SEARCH & SEIZURE, *supra*, §5.1(b) at 13-14.

Beyond breach of the peace and presence requirements, some state statutes prescribe generalized criteria to guide officers in determining whether an immediate arrest is necessary, thus addressing the problem of undue delegation of discretion. Such statutes may require a reasonable belief that the suspect (1) will not be apprehended unless immediately arrested, (2) may cause personal injury or property damage, (3) will destroy evidence, or (4) will persist in refusing to identify himself or herself and therefore cannot be issued a summons.[16] While these statutes do impose some control on police discretion to arrest, they nevertheless vastly expand the authority conferred by common law, because the "offenses" or "misdemeanors" now included cover a kaleidoscopic array of new quasi-civil matters.[17]

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[15] *See* Alaska Stat. §12.25.030(b)((2)(A) (Michie 1999); Del. Code Ann. tit. 11, §§1904(a)(4)-(6) (1999); Fla. Stat. Ann. §§901.15(6)-(9) (West 1999); Ga. Code Ann. §17-4-20(a) (1999); Ind. Code Ann. §§35-33-1-1(a)(3), (5) (Michie 2000); Kan. Stat. Ann. §22-2401(c)(2)(C) (West 1999); Ky. Rev. Stat. Ann. §431.005(1)(e), (2)(a) (Michie 1998); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(A) (West 1999); Mass. Ann. Laws ch. 276, §28 (West 1999); Mich. Comp. Laws Ann. §764.15(1)(m) (West 2000); Neb. Rev. Stat. §29-404.02(3) (1999); N.H. Rev. Stat. Ann. §594.10(1)(b) (1999); N.M. Stat. Ann. §31-1-7(A) (Michie 2000); N.Y. Crim. Proc. Law §140.10(1)(b) (McKinney 2000) (misdemeanors, not offenses); N.C. Gen. Stat. §15A-401(b)(2)(d) (2000); Ohio Rev. Code Ann. §2935.03(B)(1) (Anderson 2000); Or. Rev. Stat. §133.310(6)(a) (1999); Tex. Crim. P. Code. Ann. §§14.01(a)-(b), 14.03(2)-(4) (West 1998); Vt. R. Crim. P. 3(a)(2)(C) (2000); Va. Code Ann. §19.2-81(7) (Michie 2000); Wash. Rev. Code Ann. §10.31.100(1)-(2) (West. 1999), or for dangerous traffic violations, like driving while intoxicated or reckless driving, *see* Mich. Comp. Laws Ann. §764.15(1)(h)-(i) (West 2000); N.J. Stat. Ann. §39:5-25 (West 2000); N.D. Cent. Code §29-06-15(1)(f) (1999); Or. Rev. Stat. §133.310(1)(d)-(g) (1999); Wash. Rev. Code Ann. §10.31.100(3)-(4) (West 1999).

When the issue, as in many of these state statutory schemes, is whether or not to require an arrest warrant before a custodial arrest, the presence requirement provides a fair measure of alternative protection to the breach of the peace requirement. When the question, as in this case, however, is not just whether an arrest warrant is necessary, but whether an arrest is, on balance, reasonable in the enforcement of petty regulatory offenses unknown to the common law, the presence requirement by itself is inadequate to protect against overuse of the arrest power.

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[16] *See, e.g.*, Del. Code Ann. tit. 11, §1904(a)(2) (1999); Kan. Stat. Ann. §22-2401(c)(2)(A)-(C) (West 1999); Me. Rev. Stat. Ann. tit. 17-A §15(1)(a)(5)-(8) (West 1999); Mont. Code Ann. §46-6-311(1) (1999); Neb. Rev. Stat. §29-404.02(2) (1999); N.H. Rev. Stat. Ann. §594.10(1)(c) (1999); N.C. Gen. Stat. §15A-401(b)(2)(b) (2000); R.I. Gen. Laws §12-7-3 (1999); Utah Code Ann. §77-7-2(3) (1999); Vt. R. Crim. P. 3(a)(3)-(4) (2000); Wyo. Stat. Ann. §7-2-102(b)(iii) (Michie 2000); *see* ALI Model Code of Pre-Arraignment Procedures §120.1 (1975). Some statutes require both particularly dangerous offenses and risk of flight, injury, etc., *see* D.C. Code Ann. §23-581(a)(1)(C), (2) (1996); Md. Code Ann. art. 27 §594B(e), (f) (1996).

[17] This Court has held in cases concerning inventory searches of impounded automobiles that the Fourth Amendment's concern about undue delegation of discretion may be satisfied by requiring the states to provide criteria for the police to follow in deciding whether to conduct such searches. *See Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 369, 372, 379 (1976). A similar rule concerning the power of custodial arrest, requiring the states to create their own criteria or guidelines for arresting officers, would partially address the problem of arbitrary and discriminatory law enforcement. Such a rule would not be adequate, however, to prevent state statutes from authorizing arrests that are not, on balance, reasonable. The courts must decide what exigencies will permit appropriate exceptions to the rule disfavoring arrests for fine-only offenses. Legislatures, having shown themselves willing to authorize discretionary arrests for minor matters, might well posit that exigent cir-

(continued...)

At least eight states' statutory schemes appear to have addressed this problem head-on, categorically prohibiting custodial arrests for fine-only offenses.[18] The legislatures of about half the states, unlike Texas, do not authorize custodial arrest for a fine-only seat belt offense.[19]

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[17] (...continued)
cumstances exist any time arrest would further the purpose of the statute or ordinance in question, *see Diaz v. City of Fitchburg*, 176 F.3d 560, 563 (1st Cir. 1999). Such circular reasoning would evade the question of whether an arrest performed solely in order to further the purposes of an ordinance prohibiting obstruction of a passageway, jaywalking, or littering is reasonable.

[18] *See* Alaska Stat. §§12.25.030(1), 11.81.900(b)(9), (b)(58) (Michie 1999); Del. Code Ann. tit. 11, §§1904(a), 233(c), 4207 (1999); Ky. Rev. Stat. Ann. §§431.005(d), 431.060(2)-(3) (Michie 1998); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(B) (West 1999), & Me. Rev. Stat. Ann. tit. 17-A, §4-B(3) (West 1999); Or. Rev. Stat. §§133.310(1)(b), (d), 161.515(1), 161.545 (1999); Pa. R. Crim. P. 101(2)(a), (c) (West 1999), 18 Pa. Cons. Stat. Ann. §106(b)(8) (West 1999); R.I. Gen. Laws §§12-7-3, 11-1-2 (1999); S.D. Codified Laws §§23A-3-2(1), 22-6-7 (Michie 2000). In many states, it is impossible to determine from published state statutes whether custodial arrest is permitted for fine-only offenses.

[19] *See* Alaska Stat. §§12.25.030(a)(1), 11.81.900(b)(9), 28.05.095, 28.05.99 (1999); Del. Code Ann. tit. 11, §1904(a)(1), 233(c) (1999), Del. Code Ann. tit. 21, §4802(g)(1) (1999); Fla. Stat. Ann. §§901.15(1), 775.08(2)-(3), 316.614(5), (8), 318.13(3), 318.14(1) (West 1999); *see also Thomas v. Florida*, 614 So.2d at 471; Ga. Code Ann. §§17-4-20(a), 40-8-76.1(b), (e)(1) (1999); 725 Ill. Comp. Stat. Ann. 5/107-2, 625 Ill. Comp. Stat. Ann. 5/12-603(d), 725 Ill. Comp. Stat. Ann. 5/102-15 (West 2000); Ind. Code Ann. §§35-33-1-1(a)(4), 33-1-12-1, 9-19-10-2 (West 2000); Ky Rev. Stat. Ann. §§431.005(1)(d), 431.060(3), 189.125(6) (Michie 1998); La. Code Crim. Proc. Ann. art. 213 (1), art. 933(1), (4) (West 1999), La. Rev. Stat. Ann. §14.2(6), 14.7, 32:295.1(A)(1) (West 1999); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(A)(2), §4-B(1)-(3) (West 1999), Me. Rev. Stat. Ann. tit. 29-A §2081 (3-A), (D), §101(85) (West 1999); Md. Ann. Code art. 27, §594B(a) (1999), Md. Code Ann., Transp. §§22-412.3(b), 27-101(a)(2), 27-106(b) (1999); Mass. Gen. (continued...)

The legislative attempts to circumscribe the arrest power with respect to minor offenses, although not consistently as

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[19] (...continued)
Laws Ann. ch. 276, §28, Mass. Gen. Laws Ann. ch. 90, §13A (West 1999); Mich. Comp. Laws Ann. §§764.15(1)(a), 257.710e(3), (7), 257.6a, 257.907(2) (West 1999); Mont. Code Ann. §§46-6-311(1), 46-1-202(14), 45-2-101(48), 61-13-103(1), 61-13-104(1) (1999); Neb. Rev. Stat. Ann. §29-404.02(2) (1999), Neb. Rev. Stat. Ann. §60-6,270(1) (1999), Neb. Rev. Stat. §60-60,272 (1999); N.C. Gen. Stat. §§15A-401(b)(1)-(2)(b), 20-135.2A(e), 14-3.1(a) (2000); Or. Rev. Stat. §§133.310(1)(a)-(d), 161.515, 161.545, 811.210(1)(a), (2)(b), (3) (1999); Pa. R. Crim. P. 101(2)(a), 18 Pa. Stat. Ann. §106(b)(1)-(9) (a misdemeanor must carry the possibility of a minimum term of imprisonment to constitute arrestable offense), 75 Pa. Stat. Ann. §§4581(2), (3)(b) (2000); R.I. Gen. Laws §§12-7-3, 11-1-2, 31-22-22(g), (j) (1999); S.C. Code Ann. §§56-5-6520, 56-5-6540 (Law. Co-Op. 1999)("no custodial arrest for a violation of [the seat belt laws] may be made"); S.D. Codified Laws §§23A-3-2(1), 32-38-1, 32-38-5 (Michie 2000); Tenn. Code Ann. §55–9-603 (1999)("a law enforcement officer observing a violation [of the seat belt laws] shall issue a citation to the violator, but shall not arrest or take into custody any person solely for a violation of [the seat belt laws]"); Utah Code Ann. §§77-7-2(1), 76-1-601(6), 41-6-182(2), 41-6-185(1) (1999); Va. Code Ann. §§19.2-81(7), 46.2-1094(A), (G), 46.2-113, 18.2-8 (Michie 2000); Wash. Rev. Code Ann. §§10.21.100, 9A.04.040(1), 46.61.688(3), (5), 46.63.110(1) (1999). According to one source, although seat belts were required in 49 states, 36 states prohibited their officers from stopping drivers for a seat belt violation, allowing enforcement of seat belt laws only if motorists were stopped on suspicion of some more serious offense. *See* Timothy O'Neill, *No Stops for Seat Belts*, Chi. Trib., Mar. 28, 1999, at 20.

While a number of states do seem to permit custodial arrests for a violation of a fine-only seat belt law, it is difficult to provide an exact count, as the statutes of other states (Hawaii, Nevada, New York, North Dakota and Vermont) are unclear. Texas is unusually explicit in providing officers with blanket authority to arrest an individual for any traffic infraction in its code. *See* Tex. Transp. Code Ann. §543.001 (West 1999)("any peace officer may arrest without warrant a person found committing a violation of this subtitle [Rules of the Road]").

vigilant as the common law, bolster the conclusion that it is not reasonable within the meaning of the Fourth Amendment for a state to give vast and unchecked power to the police to arrest for minor regulatory offenses. However, the more permissive statutes, like those in Texas, which radically expand common law authority, demonstrate that the courts cannot optimistically defer to all legislative judgments about when arrest is reasonable.

Requiring the police, in the absence of exigent circumstances, to issue citations for minor, regulatory offenses rather than allowing them the power to arrest and search every traffic offender, jaywalker, or litterer, would obviate unreasonable arrests and would prevent widespread and inevitable problems of arbitrary and discriminatory enforcement from developing. Wayne R. LaFave, "'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma," 1974 Sup.Ct.Rev. 127, 158, 162 (the most straightforward and most efficient control "in an area with a high potential for abuse" is to limit the circumstances under which an arrest is permissible).

E. Prohibiting Arrest For Fine-Only Offenses Is Consistent With General Principles Of Constitutional Interpretation

The courts could satisfy their responsibility to ensure that there are meaningful limits on police discretion to arrest by simply ruling that custodial arrest for minor offenses is allowed whenever the individual arrest is reasonable in light of all the facts -- a case-by-case approach that would weigh the nature of the intrusion (including such facts as how many hours the suspect was actually held, whether handcuffs or shackles were used, whether the suspect was given food, etc.), against the state's interests, including an evaluation of the seriousness of the offense. Atwater's arrest, as described above, would have to be deemed unreasonable under such an approach. On the other hand, ruling that it is generally unreasonable to arrest for a fine-only offense would provide a clear and consistent rule, would allow the courts to avoid the unnecessary burden of evaluating each misdemeanor arrest individually (unless there were a claim of actual exigency), and would honor the state's own assessment of the severity of the offense.

A state's decision about how an offense is to be punished is the "best indication of the state's interest in precipitating an arrest, and is one that can be easily identified." *Welsh v. Wisconsin*, 466 U.S. at 754. *See generally* LaFave, "Case-by-Case Adjudication," *supra*. Using the legislature's own decision about the range of permissible punishment as the basis for circumscribing the arrest power respects the legislature's authority in an appropriate manner. In interpreting other provisions of the Bill of Rights, the Court has declined to create its own taxonomy of the seriousness of offenses, relying instead on legislative decisions that an offense should be punished only by a fine as dispositive of whether certain constitutional protections attach during the prosecution of that offense. The Court has held, for example, that an individual has a right to counsel under the Sixth and Fourteenth Amendments only in connection with offenses that subject that individual to incarceration, *see Argersinger v. Hamlin*, 407 U.S. 25; *Scott v. Illinois*, 440 U.S. 367 (1979). The individual does not gain a right to counsel even if subjected to enormous fines, or other serious consequences not involving incarceration. *See Argersinger*, 407 U.S. at 44 (Powell, J., concurring). Similarly, the right to a jury trial under the Sixth and Fourteenth Amendments is contingent on the legislature's determination of the level of punishment appropriate upon conviction of an offense, *Baldwin v. New York*, 399 U.S. 66 (defendant has the right to a trial by jury if the offense to be tried is punishable by at least six months incarceration), not on what offenses the courts consider to be "serious," and not on whether the legis-

lature describes its offenses as "felonies" or "misdemeanors."

The Court adopted this approach recognizing that it would be difficult to predicate the existence of constitutional rights on whether particular offenses are labeled as "felonies" or "misdemeanors," because definitions of these terms vary greatly among the states. *Welsh v. Wisconsin*, 466 U.S. at 761 (White, J., dissenting). Likewise, what is a "misdemeanor" in one state is a "petty offense" or "violation" in another. What is a "crime" in one state is a civil matter in others.[20] In the context of evaluating the reasonableness of arrests, as elsewhere, it would not be feasible to adopt a constitutional rule based on legislative labeling of the category, status, or nature of an offense. The level of punishment attached to an offense is the only consistent, easily ascertained indicator of the weight of the state's interest.

The fine-only distinction also serves the important function of preventing unauthorized and disproportionate punishment for an offense. Once a legislature has decided not to allow any possibility of incarceration upon conviction of an offense, it should be impermissible for an individual who is only suspected of committing that offense to be locked up, even for 48 hours or less, at least in the absence of truly exigent circumstances. As Judge Easterbrook has remarked, "[m]ost reports of misdemeanors will not produce a sentence of custody . . . so a custodial arrest becomes a substantial part of the punishment." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986). *See* Malcolm M. Feeley, THE PROCESS IS THE PUNISHMENT 46-47 (1979). Decisions about the appropriate punishments for offenses must be made by legislators who, unlike individual police officers, are politically accountable.

Respecting legislative judgments about the seriousness of an offense does not, of course, entitle the states to evade the Fourth Amendment requirement of reasonableness by the simple expedient of amending every ordinance in their arsenal to include a possibility of jail time, no matter how theoretical. If legislatures authorize incarceration and therefore arrest for truly trivial matters, the Court might then have to consider whether to interpret the Fourth Amendment as also incorporating the common law rule that arrests for minor offenses are impermissible in the absence of a breach of the peace, *see* pp.19-20, *supra*, or some other constraint on police discretion. While legislatures' evaluations of their own goals in criminal law enforcement are properly consulted in locating the baseline for what is reasonable, the Fourth Amendment, like its counterparts in the Bill of Rights, must sometimes be countermajoritarian.

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[20] This Court has previously held in several contexts that a state legislature's own description of its statutes as being "criminal" or "civil" is not dispositive, *see Austin v. United States*, 509 U.S. 602 (1993); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), so attempting to define arrest authority on the basis of whether a state denominates an offense as "criminal" would also be unavailing.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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No. 99-1408

In The

Supreme Court of the United States

GAIL ATWATER, et al.,

Petitioners,

v.

CITY OF LAGO VISTA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

This *amicus curiae* brief of the Cato Institute is filed with the permission of Petitioners and a copy of the letter of consent is filed herewith. Respondents did not object to the filing of this brief, but the requested letter of consent was not procured by the filing deadline. This Motion for Leave to file this *amicus curiae* brief is submitted praying for this Honorable Court's leave to file this brief in support of Petitioners.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited constitutional government. To further those ends, Cato Institute scholars have published a number of works discussing the importance of the Bill of Rights, including the constitutional protections against warrantless and unreasonable seizures. *See e.g.*, Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711 (2000). The instant case raises important questions concerning the power to effect warrantless arrests and is thus of substantial interest to the Cato Institute.[1]

STATEMENT OF FACTS

The Texas Transportation Code authorizes police agents to arrest people who disobey code regulations. Tex. Transp. Code Ann. § 543.001. The Texas Transportation Code requires people to wear seatbelts when operating a motor vehicle. Tex. Transp. Code Ann. § 545.413 (1999). The penalty for not wearing a seatbelt is a maximum fifty dollar fine. Tex. Transp. Code Ann. § 545.412(b).

Gail Atwater was arrested for failing to wear her seatbelt while driving her automobile. Ms. Atwater was

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[1] In conformity with Supreme Court Rules, *amicus* states that counsel for a party did not author this brief in whole or in part; and no person or entities other than the *amicus*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

handcuffed in public and was then transported to the local jail. After approximately one hour, Ms. Atwater appeared before a judicial magistrate and was released from custody after posting bail.

Ms. Atwater subsequently brought a legal action against the local municipality, the City of Lago Vista, alleging that her constitutional rights had been violated. This case presents the question of whether the Texas legislature can bypass the warrant requirement of the Fourth Amendment and empower executive branch officials to effect warrantless arrests for misdemeanor offenses that do not involve a breach of the peace.

SUMMARY OF ARGUMENT

The Fourth Amendment to the United States Constitution guarantees our right to be free from unreasonable seizure at the hands of government officials. At the core of the Fourth Amendment lie fundamental protections of the common law. Among the protections afforded citizens at common law was the prohibition on warrantless arrests for minor offenses unless they involved a breach of peace.

The United States Court of Appeals for the Fifth Circuit ignored this time-honored prohibition and instead forged a more malleable balancing approach to determine the reasonableness of Gail Atwater's arrest. *Atwater v. City of Lago Vista*, 195 F.3d 242, 244-245 (1999). The proper balance in this case, however, was struck centuries ago in

the traditions of the common law. Under a proper understanding of the Fourth Amendment based upon the common law and first principles, Ms. Atwater and others who violate minor laws that do not breach the peace cannot be subject to a warrantless, custodial arrest.

ARGUMENT

I. THIS COURT SHOULD DRAW ON THE COMMON LAW PRINCIPLES AT THE CORE OF THE FOURTH AMENDMENT BY RECOGNIZING THE TIME-HONORED PROHIBITION OF WARRANTLESS ARRESTS FOR MINOR OFFENSES NOT INVOLVING A BREACH OF THE PEACE.

The Fourth Amendment to the United States Constitution declares that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " A full custodial arrest of an individual – like the arrest of Gail Atwater in this case – is the "quintessential 'seizure of the person' " under the Fourth Amendment. *California v. Hodari D.*, 499 U.S. 621, 624 (1991). An arrest has been traditionally defined as the "grasping or application of physical force" by a police officer to a citizen. *Id.* It constitutes one of the most powerful and dramatic applications of state power to an individual. Not only do arrests constitute serious infringements on liberty, they also carry real-world consequences to individual citizens. The statement "So-and-So had been arrested" still carries enough shock value to most people that even a relatively routine arrest and detention like that experienced by Ms. Atwater could have serious

repercussions among neighbors, friends, and family. That is one of the reasons why strict rules governing arrests evolved at common law and were constitutionalized by the Fourth Amendment.

The Fourth Amendment establishes a "practical compromise between the rights of individuals and the realities of law enforcement." *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991). Courts normally define the proper balance between these two principles to determine which searches and seizures are reasonable. *See e.g., Payton v. New York*, 455 U.S. 573, 585 (1980) (a warrantless arrest "is a species of seizure required by the [Fourth] Amendment to be reasonable"). For the issue in this case, the balance has already been struck centuries ago in the traditions of the common law.

The common law prohibited the warrantless arrest of an individual for a minor offense unless it involved a breach of the peace. A "peace officer" at common law had "no power of arresting without warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence." *Halsbury's Laws of England*, vol. 9, part III, 612 (*quoted in Carroll v. United States*, 267 U.S. 132, 156 (1925)).

This common law guarantee has direct bearing on protections afforded individuals under the Fourth Amendment. As Justice Story noted, the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, *Commentaries on the Constitution* 748 (1833). This Court has also held that the "common law . . . has guided

interpretation of the Fourth Amendment." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1976). Typically, the Fourth Amendment assures protection of the common liberties of citizens that were guaranteed at the time of the Founding. *Hodari D.*, 499 U.S. at 633-34. In this case, the common law could not be more clear or straightforward: warrantless arrests for minor offenses are prohibited unless they involve a breach of the peace.

II. THE COMMON LAW FOUNDATION OF THE FOURTH AMENDMENT IS CONSTANTLY BEING THREATENED BY LEGISLATIVE ABROGATION.

It is important for this Court to recognize that the instant case is about *legislative power*. The Fourth Amendment will lose all of its vitality if the legislature can simply abrogate the common law principles that were in place at the founding.

Very serious incursions have already been established. Professor Thomas Davies recently completed important research showing that warrants were the central component of the common law regime at the time of the framing. *See* Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). During the nineteenth century, however, courts and legislatures expanded the power of executive branch agents to conduct warrantless arrests. *Id.* at 634-642. Of course, the common law right against false imprisonment was simultaneously "redefined." *See id.* at 641 n. 256. *See also* Lynch, *'We Own the Night:' Amadou Diallo's Deadly Encounter With New York City's Street Crimes Unit*, Cato Institute Briefing Paper No. 56, March 31, 2000.

The legislature has also acquired the power to override the common law of trespass by simply making it a crime for someone to refuse admittance to executive branch officials. *See e.g., Frank v. Maryland*, 359 U.S. 360 (1959); *Donovan v. Dewey*, 452 U.S. 594 (1981). *Note also Santikos v. State*, 836 S.W. 2d 631 (1992) (Texas statute authorizing warrantless inspections "at any time."); *Foe v. Ohio Liquor Control Commission*, 694 N.E.2d 905 (1998) (Ohio statute authorizing unannounced, no-knock, warrantless inspections).

Moreover, under the common law, Americans had the right to resist an unlawful arrest. *See United States v. DiRe*, 332 U.S. 581, 594 (1948). But that "check" upon state agents is also being abrogated by legislatures. *See State v. Hobson*, 577 N.W. 2d 825 (1998) (collecting cases). *Note also State v. Valentine*, 935 P. 2d 1294 (1997) (Sanders, J., dissenting); *State v. Bradshaw*, 541 P. 2d 800 (1975).

It is disturbing to consider what the American legal landscape will look like in thirty years if such inroads continue. If legislators can override the law of trespass and eliminate the right to resist an unlawful arrest, can they clothe executive branch agents with an irrebuttable presumption of immunity against false arrest and malicious prosecution? *Cf. Dragna v. White*, 280 P. 2d 817 (1955). Can they transfer the warrant-issuing power from the judicial branch to the executive branch? *See e.g., Smith v. United States*, No. 93-1543 (5th Cir. 1994), *cert. denied*, 513 U.S. 811 (1994) (No. 93-1842). Whether such legislative powers are constitutionally permissible would seem to turn upon whether certain common law principles were "constitutionalized" by the Fourth Amendment. *See*

Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J. L. & PUB. POL'Y 711 (2000).

Another question raised by the instant case is this: If the Texas legislature can abrogate the common law and empower executive agents to make warrantless arrests for fine-only offenses, can it go even further and authorize the use of deadly force to stop a fleeing misdemeanant? (*See e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (O'Connor, J., dissenting)). If not, why not?

This Court has thwarted several legislative and executive attempts to dilute Fourth Amendment safeguards. *See e.g., Richards v. Wisconsin*, 520 U.S. 385 (1997) (holding that the common law "knock and announce" rule cannot be abrogated); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that the legislature may not transfer the probable cause determination from the judicial branch to the executive branch). It is vitally important to thwart the instant attempt by the Texas legislature to override the common law and to expand the power of executive branch agents to effect the arrest of citizens for minor offenses that do not involve a breach of the peace.

CONCLUSION

For the foregoing reasons, *amicus curiae* Cato Institute urges this Court to reverse the *en banc* ruling of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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No. 99-1408

In the
Supreme Court of the United States

GAIL ATWATER, *ET AL.*,
Petitioners,

v.

CITY OF LAGO VISTA, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE TEXAS POLICE CHIEFS ASSOCIATION

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AMICUS CURIAE BRIEF OF THE TEXAS POLICE CHIEFS ASSOCIATION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Amicus Curiae Texas Police Chiefs Association ("TPCA")[1] submits the following in further support of Respondents' assertion that the judgment of the Court of Appeals should be affirmed.

[1] No outside source has paid, or will be paid, any fee for preparation of this brief of *amicus curiae*. The writer is General Counsel of and for the *amicus curiae* Texas Police Chiefs Association. *See* SUP. CT. R. 37.6.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Texas Police Chiefs Association ("TPCA") represents more than six hundred police chiefs in the State of Texas. Police chiefs are responsible for the hiring and training of police officers, as well as establishing policy for their respective departments. Because of these responsibilities, as an organization we have a vested interest in court rulings as well as statutory law.

Due to the nature of police work, an officer has traditionally been given broad discretion in a number of areas. One of the most important is the discretion to arrest an individual or not, given probable cause to arrest. As such, the constitutional requirements of all arrests must be governed by clear and consistent requirements. TPCA is concerned and opposed to the alteration of the current and long-standing probable cause standards for arrest. TPCA requests that the judgment of the Court of Appeals be affirmed.

The Texas Police Chiefs Association respectfully moves for leave to file the attached Brief Amicus Curiae in this case.

The parties have given their consent to the filing of this brief through a blanket letter of consent filed with this Court on September 12, 2000. *See* SUP. CT. R. 37.2 (a).

SUMMARY OF THE ARGUMENT

Arrests in Texas are governed by Texas statutory law, the Texas Constitution, and the United States Constitution. The purpose of this brief is to ensure that the constitutionality of Texas arrests continue to be evaluated in a manner consistent with precedence, and constitutional requirements.

On March 26, 1997, a Texas police officer witnessed a woman committing five misdemeanor traffic offenses. Each offense allowed for the offender's arrest on the day in question. On March 26, 1997, Officer Turek arrested Petitioner Atwater for four misdemeanor offenses. She appeared before a magistrate and was released.

Texas law authorizes the arrest of offenders like Petitioner Atwater. The statutes do not limit arrests to only breaches of the peace. Petitioners do not challenge the constitutionality of the relevant statutes. Nonetheless, Petitioners complain that the arrest was unreasonable.

Clearly, under Texas law, the officer had probable cause to arrest, as he witnessed the offenses. Petitioners ask this Court to declare the arrest unconstitutional, despite undisputed probable cause. Probable cause has always been the test for ensuring that public arrests are reasonable. This requirement is reflected in precedent from this Court. The probable cause test fairly balances individual needs against state and public needs. The United States Constitution does not require courts to subjectively or objectively evaluate the merits of each and every arrest in order to determine reasonableness. Instead, every arrest requires probable cause. When a public arrest is made with probable cause, it is reasonable. When Petitioners fail to deny that the officer had probable cause to arrest her, they admit that Ms. Atwater's arrest was reasonable.

Petitioners want this Court to require more than probable cause to justify the arrest, when probable cause has always authorized a public arrest. Officer Turek's conduct was in compliance with clearly established law.

ARGUMENT

I. TEXAS TRAFFIC AND ARREST LAWS ARE CONSTITUTIONAL.

Texas law governs vehicle operation and the enforcement of vehicle operation requirements. Texas law requires that operators use seatbelts, and carry proof of their driver's license and financial responsibility, when they are operating a vehicle. TEX. TRANSP. CODE ANN. §545.413(a),§521.025 and §601, *et seq.* (Vernon's 1999). The constitutionality of these provisions is not disputed.

Texas law also governs the enforcement of these traffic regulations. An officer can arrest most misdemeanor offenders without a warrant if the offense is committed in the officer's presence or view. TEX. CODE CRIM. PROC. ANN. art. 14.01(b)(Vernon's 1997). In addition, Chapter 543 of the Texas Transportation Code governs the arrest and charging procedures for certain traffic violations, including violation of the safety belt provisions. The constitutionality of these laws is uncontested.

Officer Turek elected to arrest Petitioner Atwater after witnessing the commission of five misdemeanor offenses. Petitioners do not dispute that Officer Turek complied with the Texas statutes. Despite Petitioners' argument, the arrest was reasonable.

II. ARREST STANDARDS SHOULD BE CONSISTENTLY APPLIED.

Petitioners argue that the probable cause arrest of Gail Atwater was unreasonable under the Fourth Amendment to the United States Constitution. The Constitution requires that

all arrests be reasonable. U.S. CONST. amend. IV. It is well-settled that a public arrest is reasonable if it is made with probable cause. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *Dunaway v. New York*, 442 U.S. 200, 208 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

The Fifth Circuit has consistently limited its evaluation of misdemeanor arrests to the issue of probable cause. *United States v. Thomas*, 120 F.3d 564, 573 (5th Cir.1997), *cert. denied*, 118 S.Ct. 721 (1998); *United States v. Basey*, 816 F.2d 980, 990-91 (5th Cir. 1987); *Sorenson v. Ferrie*, 134 F.3d 325, 328 (5th Cir. 1998); *Mangieri v. Clifton*, 29 F.3d 1012 (5th Cir. 1994); *Fields v. City of S. Houston*, 922 F.2d 1183 (5th Cir. 1991). This standard is also well-settled in Texas courts. *See, e.g., Bruno v. Texas*, 922 S.W.2d 292 (Tex. App.—Amarillo 1996, no writ); *Myles v. Texas*, 946 S.W.2d 630 (Tex. App.—Houst. [14th Dist.] 1997, no writ); *Madison v. State*, 922 S.W.2d 610 (Tex. App.—Texarkana 1996, writ ref'd).

The probable cause standard for public arrests has been the touchstone of federal and state law for over a century. Petitioners provide no basis in the Constitution, statutory law, or in policy for altering this consistently applied principle of constitutional law. Officer Turek had probable cause to arrest Petitioner Atwater. An arrest made with probable cause is a reasonable arrest. As a result, Petitioner Atwater's arrest was reasonable.

III. Probable Cause Is the Requirement for All Arrests.

Petitioners ask this Court to look beyond probable cause to determine the reasonableness of the public arrest. The probable cause test already balances the interests between the state and the individual. *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Gerstein v. Pugh*, 420 U.S.103, 112 (1975). This Court selected the probable cause test to specifically avoid the need to perform a case-by-case evaluation of the facts and circumstances that arise in the context of each and every arrest. *Dunaway v. New York*, 442 U.S. 200, 208 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

Despite these precedents, Petitioners ask this Court to look beyond probable cause. Petitioners urge this Court to perform the case-by-case analysis expressly rejected in *Dunaway*. 442 U.S. at 208; *see also Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

Like Petitioners, other claimants have expressly asked courts to consider factors, besides probable cause, to evaluate their arrests. Federal and state courts have rejected consideration of (a) the seriousness of the offense or punishment;[2] (b) whether issuance of citation is an option;[3] (c)

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[2] *Ricci v. Arlington Heights*, 116 F.3d 288, 290-91 (7th Cir. 1997), *cert. dismissed*, 523 U.S. 613 (1998); *Fisher v. WMATA*, 690 F.2d 1133, 1139 (4th Cir. 1982); *Illinois v. Ramirez*, 618 N.E.2d 638 (Ill. App. Ct. 1993).

[3] *Moore v. Gwinnett County*, 967 F.2d 1495 (11th Cir. 1992), *cert. denied*, 506 U.S.1081 (1993); *Higbee v. City of San Diego*, 911 F.2d 377,379 (9th Cir. 1990); *Ramirez*, 618 N.E.2d at 638.

if state law was complied with;[4] (d) the peace officer's subjective intent;[5] (e) whether other officers would have made the arrest;[6] or (f) if the arrest complied with usual police department policies or practices.[7] In each of these cases, the court concluded that probable cause alone established the reasonableness of the public arrest.

The probable cause requirement provides officers and individuals with a bright line standard. It clearly sets out what is required to satisfy the constitutional requirements for an arrest. Probable cause is established when the officer has reason to believe that the suspect committed or is committing a criminal offense. Once the officer has probable cause, the decision to arrest is left to his or her discretion. The officer is entitled to exercise this discretion without concern that a

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[4] *See Fields v. City of S. Houston*, 922 F.2d 1183 (5th Cir. 1991); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir 1997); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Barry v. Fowler*, 902 F.2d 770, 772-73 (9th Cir. 1990); *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir. 1974). In each of these cases, the court concluded that probable cause justified the warrantless arrests, despite the violation of state laws and early common law that restricted the arrest of misdemeanor offenders to only offenses that were committed in the officer's presence.

[5] *Whren v. United States*, 517 U.S. 806, 813 (1996); *Basey*, 816 F.2d at 990-91; *Holland v. City of Portland*, 102 F.3d 6 (1st Cir. 1996).

[6] *Whren*, 517 U.S. at 813-4; *Moore*, 967 F.2d at 1498.

[7] *United States of America v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), *cert. denied*, 502 U.S. 963 (1991).

claimant will ask the court to second-guess the determination that was made at the scene of the arrest.

An arrest made with probable cause is a reasonable arrest. Petitioners' attempt to compel this Court to diverge from its own directives should be rejected.

IV. THE OLD ENGLISH ARREST STANDARD HAS NOT BEEN ADOPTED.

Petitioners also complain that the arrest was unreasonable because it did not satisfy the Old English common law standard for arrests. As Petitioner notes, in early England, arrest was permitted without a warrant if the offense constituted a felony, or if it was a breach of peace that was committed in the officer's presence.

The above misdemeanor arrest standard has never been adopted by the Court. This requirement was ignored by the Court as part of the standard for public arrests. *See United States v. Watson,* 423 U.S. at 418. It was ignored in the proposed Model Code of Pre-Arraignment Procedure, which the Court relied on in *Watson. Id.*; MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §120.1. It has been ignored in state and federal statutory law. *See, e.g.*,18 U.S.C.A. § 3052 (since 1951, allowing F.B.I. agents to arrest without requiring a breach of the peace); TEX. CODE CRIM. PROC. ANN. art. 14.01(b) (since 1967, allowing Texas peace officers to arrest without requiring breach of peace).

Moreover, the "presence" component of the common law standard has already been expressly rejected as a constitutional requirement, by a number of Circuits. *See Fields v. City of S. Houston*, 922 F.2d 1183 (5th Cir. 1991);

Vargas-Badillo v. Diaz-Torres, 114 F.3d 3 (1st Cir 1997); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Barry v. Fowler*, 902 F.2d 770, 772-73 (9th Cir. 1990); *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir. 1974). As noted in *Street,* the Court has never given constitutional force to the presence requirement of the common law rule, but has instead relied on the existence of probable cause. 492 F.2d at 371-72.

Petitioners' reliance on the Old English rule in order to establish that the arrest was unreasonable is without justification. Petitioner Atwater's arrest was reasonable, because, in accordance with long-standing law, Officer Turek had probable cause.

V. CONSTITUTIONAL LEGISLATIVE INTENT SHOULD CONTROL.

It is undisputed that Petitioner Atwater violated numerous traffic restrictions. The Texas Legislature designated these traffic offenses as "misdemeanor" offenses. In addition, it provided for the enforcement of these statutes by custodial arrest. Petitioners do not challenge the constitutionality of these Texas traffic laws. Nonetheless, Petitioners ask this Court to override the constitutional directives of the Texas Legislature.

It is uniquely within the Legislature's charge to determine what conduct constitutes criminal conduct, and what conduct can be enforced by custodial arrest. As a matter of public policy, the Texas Legislature has determined that officers should have discretion to make the custodial arrest of most traffic offenders. Texas law, however, does not permit the custodial arrest of all traffic offenders. For example, it has removed the officer's discretion to arrest certain speed limit

violators. *See* TEX. TRANSP. CODE Ch. 543. In the 76th Legislative Session ending in 1999, the Texas House of Representatives addressed the issue of arresting traffic offenders. Failed House Bill 789 attempted to substantially restrict an officer's discretion to arrest.

It is anticipated that the 77th Texas Legislature will again address the issue of traffic arrests. Thus the citizens of Texas through their state representatives are able to decide what violations constitute arrestable offenses.

As long as the officer has probable cause to publicly arrest the offender, the individual's constitutional rights are preserved. Officer Turek had probable cause to arrest Petitioner Atwater, as a result, her arrest was reasonable as a matter of law.

VI. PUBLIC POLICY.

Some *amici* have suggested that it is against public policy to waste local resources on the arrest of traffic offenders. The use of local tax dollars to support public safety and how those dollars are best utilized is not a constitutional question. It is a question for local elected officials to decide what they think is the appropriate amount of funds to be expended to best insure the safety of the general public. They charge police chiefs and other law enforcement administrators with the task of carrying out this policy. Citizens through the election process can determine policies. Citizens can also use cities and police departments' complaint procedures for instituting change at the local level.

Amici also suggest that Texas seat belt law is not unlike a violation of failure to signal lane change. Unseatbelted

drivers are at risk not only to themselves in accidents or in the avoidance of an accident but due to the loss of vehicle control become a danger to others. Unseatbelted children are at an even greater risk and, in fact, can distract the driver from paying full attention to accident avoidance.

CONCLUSION

Law enforcement officers and the public are entitled to clear and consistent application of the law. Federal courts continuously endeavor to satisfy this demand. All arrests must be constitutionally reasonable. The reasonableness standard for public arrests is probable cause. The probable cause test objectively evaluates the peace officer's determination that a crime had been or was being committed. Once that standard is met, the officer is entitled to make a public arrest, and proceed with ordinary processing.

This standard balances the needs of the individual with those of the state and public, without requiring a case-by-case analysis of each and every arrest. This Court has consistently upheld public arrests that were made with probable cause. Every Circuit that addressed the issue has rejected application of an additional balancing test. Moreover, the breach of peace standard never was adopted as a constitutional standard.

Officer Turek had probable cause to arrest Petitioner Atwater. Her arrest complied with all constitutional requirements. As a result, the judgment of the Fifth Circuit should be affirmed.

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CITY OF LAGO VISTA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits warrantless arrests for "fine only" traffic offenses committed in the arresting officer's presence.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the legal issue presented in this case: whether the Constitution prohibits police officers from making warrantless arrests for "fine only" traffic offenses committed in the presence of the arresting officer. *Amici* filed a brief on a similar issue when it was presented in *Ricci v. Arlington Heights*, 523 U.S. 613 (1998) (dismissing cert. as improvidently granted).

There are many recurring situations in which state and local government law enforcement officers must have the authority to make warrantless arrests for traffic offenses committed in their presence, even if the penalty for the offense is a fine rather than imprisonment. *See, e.g.*, Cal. Penal Code §§ 853.6(i)(5), (7) (warrantless arrests authorized when, *inter alia*, driver fails to provide satisfactory identification or "[t]here [is] a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested"). Such arrest authority is essential

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[1] The parties have consented to the filing of this brief *amicus curiae*. A blanket consent to the filing of *amicus* briefs in support of either party has been filed with the Clerk of the Court by counsel for petitioners and counsel for respondents. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici* or their members, has made a monetary contribution to the preparation or submission of this brief.

if the law is to be enforced and the public safety protected.

Numerous States, including Texas, regard their mandatory seat belt laws as essential exercises of the police power that are designed to protect the safety not only of the driver and any passengers (including young children), but also other innocent motorists and pedestrians. *See, e.g., State v. West*, 20 S.W.3d 867, 872 (Tex. Ct. App. 2000) (the "Texas seat belt law serves the public safety and welfare by enhancing a driver's ability to maintain control of his vehicle, and by reducing injuries not only to himself, but also to others") (citation omitted); *State v. Hartog*, 440 N.W.2d 852, 857 (Iowa 1989) ("an unrestrained front seat passenger can interfere with the ability of a driver to respond to a collision"), *cert. denied*, 493 U.S. 1005 (1989); *id.* at 858 (the seat belt law also "promotes the public interest [by] reducing the public costs associated with serious injuries and deaths caused by automobile accidents"). Adoption by this Court of the varied constitutional proposals urged by petitioners and their *amici*—which are unworkable as well as inconsistent—"would constitute an intolerable burden for legitimate law enforcement." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

Because of the importance of the question presented to the protection of the public safety and health on the nation's highways and roads, *amici* submit this brief to assist the Court in the resolution of this case.

STATEMENT OF THE CASE

1. This Court has long recognized the States' "'vital interest' in highway safety and the various programs that contribute to that interest." *New York v. Class*, 475 U.S. 106, 112 (1986) (quoting *Delaware*

v. Prouse, 440 U.S. 648, 658 (1979)). "The state legislatures plainly have great leeway in providing safety regulations for all vehicles—interstate as well as local." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959).

It is a misdemeanor under Texas law for a driver to fail to wear a seat belt while operating a motor vehicle. Tex. Transp. Code Ann. § 545.413(a). *See Bridgestone/Firestone, Inc., v. Glyn-Jones*, 878 S.W.2d 132, 134 (Tex. 1994) (seat belt statute "was enacted to mandate the use of seat belts and to provide a criminal penalty for the failure to wear a seat belt"). There are separate criminal offenses for permitting children under the age of fifteen to ride in the front seat of a motor vehicle without a seat belt. Tex. Transp. Code Ann. §§ 545.412(a); 545.413(b). Under Texas law, a police officer "may arrest without warrant a person found committing" any of these traffic offenses in the officer's presence. *Id.* § 543.001. *See, e.g., Spence v. State*, 1996 Tex. App. LEXIS 3810, at *11 (Tex. Ct. App. 1996); *Palmer v. State*, 1994 Tex. App. LEXIS 2605, at *3 (Tex. Ct. App. 1994).[2]

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[2] Under Texas law, not every traffic offense committed in the presence of an officer subjects the offender to the possibility of a warrantless arrest; citations are mandatory for certain legislatively-specified traffic offenses, including speeding. *See* Tex. Transp. Code § 543.004.

Petitioners' concern that Texas police who enforce traffic laws "have the unfettered discretion to arrest anyone for even the slightest criminal infraction," Pet. Br. 33, and petitioners' reference to "the literally millions of traffic stops that occur every year," *id.* at 45, obviously overlook this fundamental state law limitation on the arrest authority of police officers in Texas.

State seat belt laws are classic exercises of the police power. Texas law is unequivocal that the purpose of its seat belt laws is to serve the public safety and health, not merely "to protect an individual from his own conduct." *State v. West*, 20 S.W.3d at 872. The "Texas seat belt law serves the public safety and welfare by enhancing a driver's ability to maintain control of his vehicle, and by reducing injuries not only to himself, but also to others." *Id.* (citing *Richards v. State*, 743 S.W.2d 747, 749 (Tex. Ct. App. 1987), *pet. ref'd*, 757 S.W.2d 723 (Texas Crim. App. 1988)). In addition to protecting the public's safety, the law also "directly affects the state's economic welfare." *Richards*, 743 S.W.2d at 749. *Cf. Prouse*, 440 U.S. at 658 (1979) ("we are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter") (footnote omitted). These cases and those from other States cited in footnote 3 below flatly refute petitioners' contention that "[s]eat belt laws . . . are readily distinguishable from most laws that further highway safety" because "they are 'designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large.'" Pet. Br. 30 (quoting opinion of court of appeals panel, Pet. App. 37a).[3]

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[3] *See also State v. Hartog*, 440 N.W.2d at 857 ("seat belt use enhances a driver's ability to maintain control of the car and avoid injuries not only to the driver but to others. . . . an unrestrained front seat passenger can interfere with the ability of a driver to respond to a collision"); *id.* at 858 (the seat belt law also "promotes the public interest [by] reducing the public costs associated with serious injuries and deaths caused by automobile accidents"); *State v. Kohrig*, 498 N.E.2d 1158, 1165 (Ill. 1986) ("children and other occupants who are wearing safety belts are less likely to distract the driver"), *app. dismissed*, 479 U.S. 1073 (1987); *State v. Swain*, 374 S.E.2d 173, 174 (N.C. Ct. App. 1988). *Cf. Simon v. Sargent*, 346 F.Supp. 277, 279 (D. Mass. 1972) (three-judge panel) (upholding State's motorcycle helmet law and reasoning that "the consequences of . . . injuries are [not] limited to the individual who sustains the injury" but extend to family and community; "[w]e do not understand a state of mind that permits plaintiff to think that only he himself is concerned"), *aff'd*, 409 U.S. 1020 (1972).

The vital public purposes served by mandatory seat belt laws are fully operative when an unbelted driver is driving alone. *See West*, 20 S.W.2d at 872; *Richards*, 743 S.W.2d at 749. They are of even greater public importance when young children are standing in the front seat of the vehicle without seat belts in violation of Tex. Transp. Code Ann. §§ 545.412(a); 545.413(b). This is both because of the risk to the children themselves, and the potential of the children to distract the driver, thereby endangering others. *See Kohrig*, 498 N.E.2d at 1165; *Safety of Child Passengers in Motor Vehicles: Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2d Sess. 9 (1990) (statement of Jerry Ralph Curry, Administrator, NHTSA) ("For 1988, . . . we estimate that the lives of about 250 children under the age of 5 were saved by child safety seats or safety belts. If all such children were properly restrained by seats or belts, . . . another 200 to 300 could be saved each year."); *id.* at 81 (statement of Frederick Locker, Juvenile Products Mfgs. Assn.) ("When you get in that car with your child it should be second nature to you to buckle your child up and then to buckle yourself up and make a point of telling the child that it is important. . . .

[D]on't cave in to the crying and wiggling of a child who wants to get out of their seat.").

2. On March 26, 1997, Lago Vista Police Officer Bart Turek stopped Gail Atwater because she was driving while her two children, Mac, three years old at the time, and Anya, aged five, were standing on the front seat of her Dodge Ram Pickup truck. Pet. Br. 2; Jonathan Ringel, *Police Power, Business Cases Top the Docket*, Legal Times, Sept. 25, 2000, at 12 (Atwater reported as having said that she had "agreed to let her kids stand on the seat to look out the window" for a toy that had fallen from the truck). "[A] few weeks before," Pet. Br. 35 n.17, Officer Turek had stopped Ms. Atwater "for allowing her son to ride on the front seat arm rest," Pet. App. 30a, although he did not issue a citation at that time because Mac's seat belt was fastened. *Id.*

On this second occasion, Officer Turek began by reminding Ms. Atwater of the earlier incident. He then placed her under arrest for violating Texas' laws that require both adults and children riding in the front seat to have their seat belts fastened. Pet. App. 52a-54a (opinion of district court).[4] Officer Turek

[4] *Amici* respectfully submit that the prior incident only a few weeks before is a critical fact in the context of the arrest. Officer Turek had, after all, very recently stopped Ms. Atwater on suspicion that her three-year old son was riding unbelted on top of the truck's front-seat armrest. This gave Officer Turek ample grounds to believe that yet another warning or even a citation would be insufficient to cause Atwater to cease the endangerment of her young children once he had left the scene.

As Officer Turek approached her vehicle, apparently Ms. Atwater told her children that "they were 'wrong' for not wearing their seat belts and the police officer was just 'doing his job.'" Pet. Br. 29. Even if Ms. Atwater also made similar statements to Officer Turek, it is obvious that a police officer has no obligation to accept the assurances of offenders that they will henceforth cease the offense in question.

denied Ms. Atwater's request to take her children to a nearby friend's house; instead, Ms. Atwater's friend came to the truck and took the children to her house for safekeeping. *Id.* at 52a. Officer Turek did not search or interrogate Ms. Atwater, but handcuffed her and took her to the Lago Vista jail, "where she spent approximately one hour." *Id.* "Atwater concedes that she and her children were not physically harmed in any way during the incident, either at the time of the stop, at the time of the handcuffing, during the transportation to the jail, or during her stay at the jail." *Id.* at 53a. Ms. Atwater then appeared before a magistrate and was released after posting bond of $ 310. Pet. App. 2a; Pet. Br. 5.[5]

[5] Ms. Atwater alleges that her arrest and detention for one hour was "particularly invasive and extreme." Pet. Br. 28. This, however, is an overstatement, as the circumstances and one-hour duration of her arrest were minimally intrusive. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (probable cause determination within 48 hours of custodial arrest is constitutionally reasonable) (citing *Gerstein*, 420 U.S. at 113).

As just noted, Ms. Atwater conceded that she was not physically harmed in any way. Pet. App. 52a. In addition, rather than engage in the potentially problematic practice of a male officer searching or patting down a female arrestee at the scene of an arrest, Turek limited his self-protective activity to handcuffing Ms. Atwater, which is standard police arrest practice.

> Every arresting officer should assume, for his own safety, that the person to be arrested is armed and will take the officer's life if given a chance. This rule holds true whether the person is being arrested for a minor misdemeanor, or for a felony. It also holds true regardless

Following her arrest, Ms. Atwater and her husband (as next friend of their children) filed suit in state court against the City of Lago Vista, Officer Turek, and Lago Vista Police Chief Frank Miller. The defendants removed the case to federal district court. The plaintiffs asserted 10 causes of action and sought class certification. Pet. App. 54a-55a.

SUMMARY OF ARGUMENT

A. This Court has emphasized that because the primary purpose of the Fourth Amendment is to regulate the police in their day-to-day law enforcement activities, it is essential that Fourth Amendment rules " 'be expressed in terms that are readily applicable by the police in the context of . . . law enforcement.' " *New York v. Belton*, 453 U.S. 454, 458 (1981) (citation omitted). For this reason, the Court has designated probable cause as the Constitution's measure of the permissibility of an arrest in all but the rarest of cases. *Gerstein v. Pugh*,

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of whether the offender is a man or a woman, or an old or a young person. . . .

[When it is not possible for a female officer to search a female arrestee at the time of the arrest,] the officer should be guided by his own good sense in insuring his safety and well-being while taking his prisoner in. Most officers have found that handcuffing the woman, with her hands in back of her, is the next best thing when she cannot be carefully searched.

Raymond E. Clift, *A Guide to Modern Police Thinking* 189, 191-92 (3d ed. 1970).

Officer Turek's use of handcuffs was particularly prudent in view of the fact that Texas has among the more permissive handgun laws in the country. *See* Handgun Control, Inc., "Texas Firearm Laws," <http://www.handguncontrol.org/stateleg/statelaws.asp>.

420 U.S. 103, 111-12 (1975); *Whren v. United States*, 517 U.S. 806, 817 (1996). Commission of—and admitting to—criminal offenses in the presence of the arresting officer is the strongest possible case of probable cause. Custodial arrests made under such circumstances are therefore constitutional under the Fourth Amendment, absent egregiously invasive arrest procedures not remotely present here.

Petitioners and their *amici* are rightly exercised at the prospect of limitless grants of arrest authority to the police, but this case poses no risk of such boundless police discretion. When, as in this case, a citizen not only commits three criminal offenses in the presence of an officer but admits to the officer that she is committing the offenses, a " 'law-abiding citizen[]' " is not left " 'at the mercy of the officers' whim or caprice.' " *Gerstein*, 420 U.S. at 112 (citation omitted).

The fact that Ms. Atwater's offenses were "fine only" traffic offenses does not alter the applicable constitutional analysis. Indeed, the facts of this case have much in common with those of *Whren*, in which the officers had observed the plaintiff commit a traffic violation. Despite the ubiquity of such offenses, the *Whren* Court emphasized that it was "aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that the infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." 517 U.S. at 818.

Petitioners and their *amici* strenuously argue that the arrest was inappropriate because the seat belt offenses in question are punishable by a fine, rather than incarceration, thereby suggesting that the police need not take them seriously. This argument is both

erroneous as a matter of policy and inconsistent with this Court's repeated recognition of the importance of fines as criminal sanctions. Although traffic offenses are so common that it would plainly be impracticable to make them all incarcerable in the first instance, that in no way diminishes their importance to the health, safety and welfare of the citizenry.

B. Affirmance of the judgment below will not result in "the very sort of unbridled [police] discretion," Pet. Br. 7, which petitioners assert was condoned by the court of appeals. In fact, the authority to make warrantless arrests for traffic offenses and other misdemeanors is intensively regulated by the States and limited as a practical matter by systemic constraints and the oversight of the political branches of government.

Every State has laws that address the authority of law enforcement officers to make warrantless arrests. Police officers must have express statutory authority to make warrantless arrests for traffic infractions, including those punishable by a fine. For example, Cal. Penal Code § 853.6(i) encourages the use of citations for traffic offenses; it does not, however, prohibit custodial arrests. Indeed, it enumerates several situations in which the police are authorized to make arrests, rather than simply cite and release the offender. These include situations in which the offender is intoxicated, is unable to care for their own safety, fails to provide adequate identification, or, of greatest relevance to this case, when there is "a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested." *Id.* § 853.6(i)(7).

Moreover, both police officers and the elected officials who oversee them are well aware that arrests are costly and time-consuming for law enforcement officers. This creates an extremely powerful disincentive to arrest except where necessary for important law enforcement purposes. *See* Br. *Am. Cur.* Institute on Criminal Justice and Eleven Leading Experts on Law Enforcement and Corrections Administration and Policy 11.

Finally, and perhaps most important, a categorical constitutional rule along the lines urged by petitioners and their *amici* would be unworkable. Even if such a prohibition were desirable, it could not be formulated in a manner that could be fairly applied by police officers on the beat. This Court has made it absolutely clear that police officers require clear rules of straightforward application that they can feasibly and fairly apply under the stressful conditions of day-to-day policing. *See Belton*, 453 U.S. at 458.

The fact that any categorical constitutional prohibition would be unworkable and pose major obstacles to legitimate law enforcement is demonstrated by the fact that the relevant model codes fail to contain such a rule. Moreover, neither petitioners nor their *amici* have been able to devise a workable rule, or even to agree upon what such a rule should be. Given the extensive regulation of warrantless arrests already in place in every State, the powerful systemic disincentives against costly and time-consuming arrests unless they serve important law enforcement purposes, and the existence of extensive political oversight of the police, no further intervention by this Court is needed.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT PROHIBIT WARRANTLESS ARRESTS FOR "FINE ONLY" TRAFFIC OFFENSES COMMITTED IN THE ARRESTING OFFICER'S PRESENCE

A. Probable Cause Is The Constitution's Measure Of The Permissibility Of An Arrest And Commission Of An Offense In The Arresting Officer's Presence Is The Strongest Possible Case Of Probable Cause

Petitioners and their *amici* rightly decry the prospect that the police be given "extravagant grant[s] of discretionary authority." ACLU Br. *Am. Cur.* 6.[6] In this regard the ACLU observes that "[i]t is by now familiar history that the framers' dismay at statutes granting such general prerogatives was one of the principal motivating factors, both for the Revolution and the creation of the Fourth Amendment itself." *Id.* at 6-7 (citing Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-78 (1937)).[7]

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[6] The ACLU bases its position at least in part on a misunderstanding of Texas law. According to the ACLU, "Texas law delegates to every peace officer the power to arrest . . . any person who has committed any infraction of its traffic code." ACLU Br. at 6. This statement of the law is erroneous. *See* note 2, *supra* (citing Tex. Transp. Code § 543.004, which prohibits arrests for specified offenses, including speeding).

[7] Petitioners' argument that the custodial arrest of Ms. Atwater was unconstitutional because the Fourth Amendment limits warrantless arrests to felonies and misdemeanors involving breaches of the peace, Pet. Br. 13-20, is without merit for three reasons.

First, the court of appeals unequivocally held that petitioners have waived this argument. *See* Pet. App. 4a-5a n.3. Second, this Court has repeatedly rejected the contention that its Fourth

More to the point, however, "[t]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (citing Lasson, *supra*, at 79-105). Indeed, "the Second Congress' passage of an Act authorizing such arrests so soon after the adoption of the Fourth Amendment itself underscores the probability that the constitutional provision was intended to restrict entirely different practices." *Id.* at 429-30 (footnote omitted). *See also id.* at 420-21 (majority opinion); *Long v. Ansell*, 293 U.S. 76, 83 (1934) ("When the Constitution was adopted, arrests in civil suits were still common in America.").

The Fourth Amendment responds to the potential for unbounded police discretion to arrest by its requirement of probable cause. To allow arrest on some lesser basis than probable cause would " 'leave law-abiding citizens at the mercy of the officers' whim or caprice,' " *Gerstein*, 420 U.S. at 112 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)), the precise evil posed by the infamous writs of

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Amendment decisions have " 'simply frozen into constitutional law those enforcement practices that existed at the time of the Fourth Amendment's passage.' " *Steagald v. United States*, 451 U.S. 204, 217 n. 10 (1981) (quoting *Payton v. New York*, 445 U.S. 573, 591 n. 33 (1980)). Finally, even if warrantless arrests were limited to misdemeanors constituting "breaches of the peace," Ms. Atwater's offenses would satisfy that standard. *See City of Boerne v. Flores*, 521 U.S. 507, 539-40 (1997) (Scalia, J., dissenting) (in eighteenth-century English and American law, "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws") (collecting cases and other authorities).

assistance so understandably (but irrelevantly) criticized by petitioners and their *amici*. *See also Whren v. United States*, 517 U.S. 806, 817 (1996) ("*probable cause*" is the "*traditional justification*" for "police intrusion"). Thus, *Gerstein* explains,

> The standard for arrest is probable cause, defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.

420 U.S. at 111-12 (quoting *Beck v. Ohio,* 379 U.S. 89, 91 (1964) (other citations omitted)). Under this standard, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.* at 113-14.

In this case, a citizen not only commited three offenses in the presence of an officer but admitted to the officer that she had committed the offenses. *See* Pet. Br. 29; *see also* Ringel, *supra,* at 12 ("Atwater says she knew she'd get a ticket for not buckling her kids' seat belts"). Ms. Atwater was thus not a " 'law-abiding citizen[]' " who was left " 'at the mercy of the officers' whim or caprice.' " *Gerstein*, 420 U.S. at 112 (quoting *Brinegar,* 338 U.S. at 176). On the contrary, Ms. Atwater's admission to Officer Turek that she was in the course of committing three offenses presented the strongest possible case of probable cause and rendered her arrest constitutionally permissible.

While "in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination,

involves a balancing of all relevant factors. . . [w]ith rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren*, 517 U.S. at 817. In *Whren* the Court elaborated on the "rare exceptions" that require such balancing:

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body[.]

Id. at 818 (citations omitted).

This case does not remotely resemble any of these "rare exceptions." As discussed *supra* at 7 & n. 5, Ms. Atwater conceded that her arrest caused no physical harm to her or her children. It was also minimally intrusive, of short duration, and fully consistent with accepted police practice for custodial arrests. *See id.* Indeed, the facts of this case have much in common with those of *Whren* itself, in which officers had observed the plaintiff commit a "civil traffic violation." 517 U.S. at 808.

Despite the commonness of traffic offenses, the *Whren* Court emphasized that it was "aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement." *Id.* at 818. Moreover, the Court has held that if even if it "could identify such exorbitant codes, we do not

know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement." *Id.* at 818-19.[8]

Petitioners and their *amici* strenuously argue that an arrest was inappropriate because the three seat belt offenses in question are punishable only by a fine, rather than by incarceration, thereby signifying that they are not to be taken seriously by law enforcement officers. This argument is both erroneous as a matter of policy and inconsistent with this Court's repeated recognition of the importance of fines as criminal sanctions. *See Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) ("The practical effects of conviction of even petty offenses . . . are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement."). *See also Tate v. Short*, 401 U.S. 395, 399 (1971) (the State has a "valid interest in enforcing payment of fines"); *Welsh v. Wisconsin*, 466 U.S. 740, 760 (1984) (White, J., dissenting) (how a State chooses to classify criminal offenses results from "a variety of social, cultural, and political reasons").

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[8] As discussed *infra* at 21-25, it is at best unclear that workable constitutional standards for warrantless arrests, beyond the existence of probable cause, can even be devised. *See New York v. Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment "'is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged'") (quoting Wayne R. LaFave, *'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 141).

Because traffic offenses occur so often, it would not be feasible to make all or even many traffic offenses mandatorily incarcerable in the first instance. This in no way diminishes the importance of the enforcement of the traffic laws to the health, safety, and welfare of the citizenry. Given the fact that their two young children were standing in the front seat of the truck at the time of the stop, it is patently irresponsible of petitioners to argue that Texas' interest in the enforcement of the laws concerning the wearing of seat belts by children under the age of 15 "is relatively slight." Pet. Br. 32. *See Safety of Child Passengers in Motor Vehicles, supra*, at 9.

Whren also disposes of the contention that unless the judgment below is reversed, police officers will abuse their authority in order to engage in large numbers of unconstitutional pretextual arrests. *See* ACLU Br. *Am. Cur.* 8. Where probable cause exists for an arrest—such as when, as here, three offenses are committed and admitted to in the presence of the arresting officer, the Court has been "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Whren*, 517 U.S. at 813.

Ms. Atwater's commission, and admission to Officer Turek, of three separate seat belt offenses—that involving herself and, of even greater seriousness, those of allowing her three and five year old children to stand, unbelted, in the front seat of her pickup truck while she was driving—epitomize probable cause and obviate the need for any further Fourth Amendment analysis in this case.

B. A Holding That The Fourth Amendment Prohibits Warrantless Arrests For "Fine Only" Traffic Offenses Is Unnecessary And Would Intolerably Handicap Legitimate Law Enforcement

If the Court declines to adopt a Fourth Amendment rule along the lines advocated by petitioners, the result will not be "the very sort of unbridled [police] discretion," Pet. Br. 7, which they assert was condoned by the court of appeals. In fact, the authority to make warrantless arrests for traffic offenses and other misdemeanors is intensively regulated by the States and is limited as a practical matter by systemic constraints and oversight of the police by the political branches of government.

Every State has laws that address the authority of law enforcement officers to make warrantless arrests. *See* Appendix to Br. *Am. Cur.* of the United States, *Ricci v. Village of Arlington Heights*, No. 97-501 (filed March 1998), *cert. dismissed,* 523 U.S. 613 (1998). Police officers in every jurisdiction must have express statutory authority in order to make warrantless arrests for traffic infractions, including those punishable by a fine. This point is graphically made by Cal. Penal Code § 853.6(i). While Section 853.6(i) encourages the use of citations when possible, it does not prohibit custodial arrests. Indeed, it specifies numerous situations in which the police are authorized to make arrests, rather than simply cite and release the offender. These include instances in which the offender is intoxicated, is unable to care for their own safety, has failed or refused to provide adequate identification, or refused to sign a notice to appear. *See id.* §§ 853.6(i)(1), (2), (5), (7), (8). *See also Gustafson v. Florida*, 414 U.S. 260, 265 (1973)

(upholding warrantless arrest for driving without driver's license in one's possession).

Of particular relevance to this case, California law expressly authorizes arrest for fine-only traffic offenses when there is "a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested." *Id.* § 853.6(i)(7). *See also* American Bar Association, *Standards for Criminal Justice* § 10.2-1 (2d ed. 1980), History of Standard (custodial arrests permissible when necessary "to protect the accused or others where his continued liberty would constitute a risk of immediate harm") (citation omitted) (quoted in Br. *Am. Cur.* Institute on Criminal Justice and Eleven Leading Experts on Law Enforcement and Corrections Administration and Policy 22 (hereinafter "Br. Eleven Leading Experts")).

Some States, like Texas, expressly authorize warrantless arrests for seat belt violations. *State v. West,* 20 S.W.3d at 871; *Spence v. State,* 1996 Tex. App. LEXIS 3810 at *11-*12; *Palmer v. State*, 1994 Tex. App. LEXIS 2605 at *3 (Tex. Ct. App. 1994). *See also State v. Cook,* 530 N.W.2d 728, 732 (Iowa 1995) (officer's observation that motorist was not wearing seat belt "gave him probable cause to arrest" the motorist) (citing Iowa Code § 804.7(1)); *Kodani v. Snyder*, 89 Cal. Rptr. 2d 362, 366 n.7 (Cal. App. 1999) (since 1995 California law has authorized an officer to "stop [] or arrest [] a person for not wearing a seat belt" even if "the officer ha[s] no other cause to stop or seize the person other than for that violation"); *see also* Br. *Am. Cur.* ACLU at 25 n. 19 ("a number of states do seem to permit custodial arrests for a violation of a fine-only seat belt law"). Other States

prohibit arrests for seat belt violations alone. *See* S.C. Code Ann. §§ 56-5-6520, 56-5-6540; Tenn. Code Ann. § 55-9-603. While different States may reach different conclusions on the permissibility of custodial arrests for fine-only seat belt violations,[9] it is critical to the Court's decision in this case that the subject of warrantless arrests for misdemeanors is intensively regulated in every State.

Second, both police officers and the elected officials who oversee them are well aware that arrests are costly and time-consuming for law enforcement officers. This creates an extremely powerful disincentive to arrest except where necessary for important law enforcement purposes. The manner in which this disincentive operates is succinctly explained by petitioners' *amici*, who write that subjecting traffic offenders to custodial arrests creates

> serious problems for law enforcement. Short-term detainees such as Ms. Atwater cause significant management problems for jail administrators. They also burden the courts and magistrates with additional workload in the hours immediately following arrest. Moreover, arrests such as this remove the arresting officer from patrol duty, thus compromising public

[9] The fact that some States authorize custodial arrests for seat belt violations while others do not simply illustrates the fundamental point made by the Fourth Circuit some years ago:

> The fourth amendment protects individuals from unfounded arrests by requiring reasonable grounds to believe a crime has been committed. The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right.

Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974).

> safety. . . . . Correctional professionals accordingly discourage the practice of arresting misdemeanor offenders, and encourage a reduction in the number of transient inmates brought to the jail.

Br. *Am. Cur.* Eleven Leading Experts 11, 14. The existence of these powerful practical constraints establishes that affirmance of the judgment below will not lead to the tidal wave of abusive arrests prophesied by petitioners.

Finally, and perhaps most important, a categorical constitutional rule along the lines urged by petitioners or their *amici* would be unworkable. As indicated above, and as is recognized in the laws of many States, there are simply too many varied and recurring situations in which the public interest requires that the police have the authority to make warrantless arrests of persons committing traffic offenses in the presence of an officer. Even though the offense (or at least the *first* offense) may be punishable only by a fine, a citation may not suffice to protect the public interest, or even the interest of the arrestee. *See, e.g.*, Cal. Penal Code § 853.6(i). For this reason, a categorical prohibition of warrantless arrests for fine only traffic offenses would be "an intolerable handicap for legitimate law enforcement." *Gerstein*, 420 U.S. at 113.

Moreover, *amici* respectfully submit that such a constitutional prohibition could not be formulated in a manner that would be workable for the police officers on the beat. This Court has made it abundantly clear that police officers require clear rules of straightforward application that they can feasibly and fairly apply under the stressful conditions of day-to-day policing.

As the Court explained in *Belton*, the Fourth Amendment

> "is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'"

453 U.S. at 458 (quoting LaFave, *'Case-by-Case Adjudication' Versus 'Standardized Procedures,'* 1974 Sup. Ct. Rev. at 141). *Accord Illinois v. Lafayette*, 462 U.S. 640, 648 (1983). *Cf. id.* at 647 (reasonableness of arrest "does not necessarily or invariably turn on the existence of alternative 'less intrusive' means"); *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (same).

The fact that any categorical constitutional prohibition would be unworkable and pose insuperable obstacles to legitimate law enforcement is demonstrated by the fact that the relevant model codes fail to contain any such rule. For example, the American Law Institute, *Model Code of Pre-Arraignment Procedure* (1975)—which seeks to balance individual rights and the needs of law enforcement—expressly declines to adopt a rule prohibiting warrantless arrests for "petty misdemeanors" committed in the presence of the arresting officer. While stating a preference for the "maximum use of citations," *id.* § 120.2(4), the drafters of the Code nonetheless recognized that in many situations it will be "in the

public interest" that persons who commit such offenses be taken into custody rather than simply be cited and released. *Id.* The drafters concluded that "[i]t is extremely difficult in drafting a statute to make determinations that citations shall always be used for particular crimes." *Id.* commentary at 305.

The other model codes cited by petitioners' *amici* likewise decline to adopt a categorical rule prohibiting custodial arrests in cases involving fine only misdemeanors or traffic offenses. *See* Br. *Am. Cur.* Eleven Leading Experts 21-27 (citing American Bar Association, *Standards for Criminal Justice* §§ 10-2.1—10-2.2 (2d ed. 1980) (citations to be used "to the maximum extent consistent with the effective enforcement of the law" but recognizing numerous exceptions, including when "necessary to prevent imminent bodily harm to the accused or another" and enumerating four other exceptions to citation requirement); National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* R. 211 (c) (1974) (recognizing four exceptions to citation rule, including when offense involves risk of bodily injury or arrestee will continue to commit offense); National District Attorneys Association, *National Prosecution Standards* § 10.2(B) (1st ed. 1977) (citations to be used "to the greatest degree consistent with public safety" but recognizing five exceptions)).[9]

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[9] Indeed, in the current edition of its prosecution standards, which is not cited by petitioners' *amici*, the NDAA substantially broadens the exceptions to its policy favoring the issuance of citations. *See* National District Attorneys Association, *National Prosecution Standards* § 45.2b(2)(c) (2d ed. 1991) (arrest permissible when "there is reason to believe the accused will commit another crime if released"); *id.* § 45.2b(2)(e) (arrest permissible "when the accused previously has failed

A final demonstration of the erroneousness of the position of petitioners and their *amici* is their own inability to devise a workable rule for the police, or even to agree upon what such a rule should be. According to petitioners, "[t]he Fourth Amendment prohibits custodial arrests for fine-only traffic offenses except when the arrest is necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road." Pet. Br. 46. This inherently subjective test plainly fails the requirement of clarity required by *Belton* as even judges would frequently disagree as to its application.

Amicus ACLU proposes a standard that is likewise impossible for officers or courts to apply in a fair and consistent way: custodial arrests for "minor offenses" are permissible "whenever the individual arrest is reasonable in light of all of the facts—a case-by-case approach." Br. *Am. Cur.* ACLU 26.[10] Every misdemeanor arrest would be subject to judicial challenge under this amorphous standard, with resultant burdens on the police on the beat and in the litigation that would inevitably ensue.

The standard proposed by *amicus* Eleven Leading Experts (Br. at 28), while worded differently, is equally unworkable: "there may not be a custodial arrest in non-jailable misdemeanor cases absent exceptional cirumstances." Not only is it impossible

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to appear in response to a citation for an offense," even if the prior offense is a parking violation).

[10] Under the ACLU "case-by-case approach," the police and the courts must "weigh the nature of the intrusion (including such facts as how many hours the suspect was actually held, whether handcuffs or shackles were used, whether the suspect was given food, etc.)." Br. *Am. Cur.* ACLU 26.

for the police and for the courts to give clear meaning to the "exceptional circumstances" standard, but applying the standard only to "non-jailable" offenses adds yet another element of unworkability. In every State the range of misdemeanors is too great for an officer to know whether every offense is "jailable" or not. Moreover, in many cases an offense may be "nonjailable" the first time it is committed but "jailable" if a repeat offense. *See Welsh*, 466 U.S. at 746; *Carroll v. United States*, 267 U.S. 154, 157 (1925). The officer is thereby caught in a no-win situation—failure to arrest could leave a repeat offender at large, while making an arrest could subject the officer to a lawsuit.

The inability of petitioners and their *amici* to agree on a single, workable rule for assessing the constitutional reasonableness of arrests for "fine only" offenses demonstrates that the effort to impose such a standard judicially will "intolerabl[y] handicap . . . legitimate law enforcement." *Gerstein*, 420 U.S. at 113. Further constitutional limits on police authority to arrest for "fine only" offenses, beyond the Constitution's requirement of probable cause, are therefore not warranted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfuly submitted,

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No. 99-1408

IN THE

Supreme Court of the United States

GAIL ATWATER, *et al.*,
Petitioners,

v.

CITY OF LAGO VISTA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ARKANSAS, COLORADO, DELAWARE, KANSAS, MARYLAND, MONTANA, OKLAHOMA, SOUTH CAROLINA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Fourth Amendment limit the use of custodial arrests for fine-only traffic offenses?

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BRIEF OF THE STATES OF TEXAS, ARKANSAS, COLORADO, DELAWARE, KANSAS, MARYLAND, MONTANA, OKLAHOMA, SOUTH CAROLINA, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This case asks whether the Fourth Amendment prohibits the arrest of individuals who commit misdemeanor crimes punishable by fine but not jail time. The Fifth Circuit, sitting *en banc*, held that the arrest of a misdemeanor traffic offender did not violate the Fourth Amendment where the arrest was (1) supported by probable cause and (2) not effected in an extraordinary manner. *See Atwater v. City of Lago Vista*, 195 F.3d 242, 245-46 (CA5 1999) (en banc). For the reasons that follow, *amici* urge the Court to affirm the Fifth Circuit's judgment.

INTEREST OF *AMICI*

The States of Texas, Arkansas, Colorado, Delaware, Kansas, Maryland, Montana, Oklahoma, South Carolina, and Virginia appear as *amici curiae* in support of Respondents. *See* SUP. CT. R. 37.4.

Amici have an interest in this case because it implicates the States' power to enact statutes governing arrests of traffic offenders. Specifically at issue are two Texas statutes that provide peace officers with discretion to arrest individuals who (1) commit any offense in the officer's presence, or (2) violate vehicle and traffic "rules of the road" as defined by the Texas Transportation Code. *See* TEX. CODE CRIM. PROC. art. 14.01(b); TEX. TRANSP. CODE §543.001. Petitioners challenge the constitutionality of Gail Atwater's arrest for an undisputed misdemeanor violation of the Texas Transportation Code that was committed in a peace officer's presence. *See* TEX. TRANSP. CODE §545.413 (defining seatbelt offenses). As such, Petitioners necessarily put at issue the constitutionality of the Texas statutes that authorized Ms. Atwater's arrest, as well as the constitutionality of discretionary arrest statutes in other states.[1]

Three *amici* in support of Atwater[2] make explicit what is implicit in Petitioners' brief: This case asks whether the Fourth Amendment prohibits states from enacting statutes that provide officers discretion to arrest traffic offenders and other misdemeanants. *See Amicus Curiae* Br. of Cato Inst. at 2 ("This case presents the question whether the Texas legislature can bypass the warrant requirement of the Fourth Amendment and empower executive branch officials to effect

[1] The statutory arrest provision that is "[b]y far the most common" amongst the states "permits arrest without warrant for *any* misdemeanor committed in the arresting officer's presence." 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE §5.1(b), at 13-14 & n.76 (3d ed. 1996).

[2] Petitioners will be referred to collectively as "Atwater."

warrantless arrest for misdemeanor offenses that do not involve a breach of the peace."); *Amici Curiae* Br. of ACLU, *et al.*, at 26 ("[I]t is not reasonable within the meaning of the Fourth Amendment for a state to give vast and unchecked power to the police to arrest for minor regulatory offenses."); *Amicus Curiae* Br. of Texas Crim. Def. Laws. Ass'n at 3 ("[S]tatutes giving police officers the authority to arrest for traffic citations [are] unconstitutional . . . as applied in this case."). The State *amici* contend that Texas's arrest statutes are constitutional and advocate for preservation of states' traditional sovereign authority to prosecute and process criminal offenders within state borders.

SUMMARY OF THE ARGUMENT

Amici do not dispute that the States must legislate in a manner consistent with the Constitution, including the Fourth Amendment. *See, e.g., Sibron v. New York*, 392 U.S. 40, 60-61 (1968) ("New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement," provided the state does not "authorize police conduct which trenches upon Fourth Amendment rights"); *see also Payton v. New York*, 445 U.S. 573, 602 (1980). *Amici* contend, however, that the two Texas statutes implicated by this case fulfill that constitutional mandate.

In any search-and-seizure context, officer discretion must be exercised in conformance with the Fourth Amendment. While it is possible for misdemeanor or felony arrests to be executed in a manner that transgresses constitutional boundaries, the Fourth Amendment contains no categorical prohibition against arrests for certain types of offenses. As such, the Fourth Amendment does not proscribe state legislation that affords officers discretion to arrest misdemeanor traffic offenders. Rather, the Fourth Amendment informs an officer's exercise of that statutory discretion.

Atwater and her supporting *amici* do not trust police officers to obey the Constitution. They presuppose that, given

discretion, officers will violate citizens' rights. Consequently, they urge the Court to set out specific rules limiting misdemeanor arrests, request that Fourth Amendment lines be drawn to varying degrees of brightness, and seek constitutionalization of multi-factor, fact-specific arrest tests and model code guidelines. *See, e.g.*, Atwater Br. at 46; Tex. Crim. Def. Laws. Ass'n Br. at 26-28; ACLU Br. at 26; *Amici Curiae* Br. of Inst. Crim. Just. at Univ. Minn. L. Sch., *et al.*, at 21-27; *see also Amicus Curiae* Br. of Ams. Effective L. Enforcement at 8-12 (supporting neither party). The Court should decline these invitations to micromanage states' procedures for enforcing traffic offenses.

No departure from traditional Fourth Amendment principles is warranted for the subset of offenders who commit misdemeanor traffic crimes. Carving offense- or punishment-specific niches out of the Fourth Amendment would be inconsistent with the Court's prior search-and-seizure jurisprudence. And on a practical level, it will promote inconsistency amongst the States: the constitutionality of arrests for the same criminal conduct will vary with state legislatures' disparate classifications of that conduct as a felony or misdemeanor, or a jail-term or fine-only offense. Instead of delineating categories of arrestable offenses, the Court should confirm that the same Fourth Amendment principles govern all criminal arrests: unless an arrest is executed in an extraordinary manner, the existence of probable cause ends the constitutional inquiry. *See Whren v. United States*, 517 U.S. 806, 818-19 (1996); *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975); *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Henry v. United States*, 361 U.S. 98, 102 (1959).

The Fourth Amendment does not require this Court to circumscribe state sovereignty by categorically prohibiting—or even categorically limiting—statutory discretion for law enforcement officers to make arrests for misdemeanors, criminal traffic violations, fine-only crimes, or

any other subcategory of criminal offenses. No line need be drawn, and no special test formulated, because general Fourth Amendment principles already govern all exercises of law enforcement discretion in the search-and-seizure context.

Arrest is not always the best course of action when the crime is a misdemeanor fine-only traffic offense. In many cases, citations will adequately ensure an offender's appearance. Citations also obviate the need to expend scarce law enforcement resources on the paperwork and other procedures associated with processing an arrestee. In fact, the Texas Department of Public Safety trains patrol recruits to use citations in lieu of arrest whenever possible. *See infra* Part I.C. But Texas's preference for citations reflects a policy decision, not a constitutional requirement. Certainly, police departments should be encouraged to develop appropriate guidelines for efficiently processing traffic offenders. And state legislatures, too, are free to implement statutory procedures if they so desire. But the Constitution does not mandate these courses of action or require this Court to micromanage law enforcement in the context of misdemeanor traffic offenses.

Because the various forms of line-drawing advocated by Atwater and her supporting *amici* unnecessarily intrude upon state sovereignty without any constitutional justification, *amici* urge the Court to affirm the Fifth Circuit's judgment.

ARGUMENT

I. AN ARREST THAT IS SUPPORTED BY PROBABLE CAUSE AND IS NOT CONDUCTED IN AN EXTRAORDINARY MANNER DOES NOT VIOLATE THE FOURTH AMENDMENT.

A. There Was Probable Cause to Believe Atwater Committed a Crime.

The Fifth Circuit applied traditional Fourth Amendment principles in concluding that Atwater's arrest for an undis-

puted criminal offense did not violate the Constitution. It is well-settled that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment." *Robinson*, 414 U.S., at 235; *see also Whren*, 517 U.S., at 818-19 ("[P]robable cause justifies a search and seizure."). Moreover, a judicial determination of probable cause is not required at the time of arrest. Rather, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S., at 113-14.

When an officer arrests "with probable cause, he is protected" from liability under the Fourth Amendment. *Henry*, 361 U.S., at 102. Thus, in assessing the constitutionality of an arrest, the appropriate inquiry is whether at or before the time of arrest the officer "had reasonable cause to believe that a crime had been committed." *Id.*, at 103.[3]

Atwater has never denied that she failed to wear her seatbelt or to belt her two children. These are misdemeanor offenses under Texas law. *See* TEX. TRANSP. CODE §§545.413(a),(b),(d). The arresting officer personally witnessed Atwater's offenses and thus had probable cause to believe she committed a crime. Consequently, the arrest was reasonable under the Fourth Amendment. *See Robinson*, 414 U.S., at 235. Nothing more was required to satisfy "the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police conduct." *Whren*, 517 U.S., at 818.

[3] *Henry* involved a federal statute that governed warrantless arrests by FBI officers. 361 U.S., at 100. The Court noted, however, that the statutory standard paralleled the constitutional standard and therefore used Fourth Amendment principles to analyze the arrest and search at issue in that case. *Id.*

B. The Manner in Which Atwater Was Arrested Was Not Extraordinary.

The Fifth Circuit correctly concluded that once probable cause exists, no further constitutional scrutiny is needed unless the arrest is executed in an extraordinary manner. *See Lago Vista*, 195 F.3d, at 246. As the Court explained in *Whren*, there is no need to balance governmental and individual interests when there is probable cause to believe a crime has been committed:

> "Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches and seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." 517 U.S., at 818.

An extraordinary manner of arrest can occur in several ways. For example, an officer who has probable cause to make an arrest, but uses excessive force in the course of arrest, effects an unreasonable seizure in violation of the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). An officer can also effect an "extraordinary" search or seizure through "unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body." *Whren*, 517 U.S., at 818 (citations omitted). In addition, subjecting a custodial arrestee to unreasonable delay of a judicial, probable-cause determination can violate the Fourth Amendment. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56-58 (1991). These cases all speak to Fourth Amendment limitations on the manner of executing an arrest, not the permissibility of making an arrest.

There was nothing extraordinary about the manner of Ms. Atwater's arrest. She was taken to the Lago Vista police station, routinely processed, and brought before a magistrate within an hour. *See* Atwater Br. at 29. She "admits that she

suffered no physical harm during or as a result of the arrest." *Lago Vista*, 195 F.3d, at 246. Ms. Atwater no doubt found this experience "humiliating." Atwater Br. at 28. And while her arrest may have seemed extraordinary to her personally, *see id.*, at 2, it was not "extraordinary" in any *constitutional* sense.

At base, Atwater and her supporting *amici* argue that her arrest was extraordinary simply because it was for a traffic violation. *See, e.g.*, Atwater Br. at 38-39; Tex. Crim. Def. Laws. Ass'n Br. at 6. They contend that everyone violates at least some traffic law every time they drive, suggesting that the frequency of violations somehow limits the State's interest in enforcing these laws. *See, e.g.*, Atwater Br. at 20-22; *Amici Curiae* Br. of Nat'l Ass'n Crim. Def. Laws. at 3, 11.[4] The Court unanimously rejected a virtually identical argument in *Whren*:

> "Petitioners urge as an extraordinary factor in this case that the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement." 517 U.S., at 818-19.

There is nothing inherently extraordinary about an arrest for a misdemeanor traffic offense. The Fourth Amendment

[4] Atwater fully acknowledges the State's authority to enforce traffic laws through stops, but contends that enforcement through arrest is impermissible. *See* Atwater Br. at 22.

does not require the Court to ferret through each state's motor vehicle code in order to constitutionalize a hierarchy of arrestable offenses. *See id.*

A violation of law is a violation law. States retain discretion to process offenders in the manner of their choosing—provided it is not an unconstitutionally extraordinary manner. Ms. Atwater was arrested in accordance with Texas law for offenses the arresting officer personally witnessed and thus had probable cause to believe she had committed. Ms. Atwater's Fourth Amendment rights were not violated. *See Robinson*, 414 U.S., at 235; *see also Whren*, 517 U.S., at 818-19; *Gerstein*, 420 U.S., at 113-14; *Henry*, 361 U.S., at 102. The Fifth Circuit's judgment should be affirmed.

C. The State Has a Legitimate Interest in Having Its Laws Obeyed.

Because traditional Fourth Amendment principles demonstrate that no violation of Ms. Atwater's rights occurred, Atwater and her supporting *amici* ask the Court to create new rules governing arrests for misdemeanor fine-only traffic offenses—rules on which even Ms. Atwater and her *amici* cannot agree. According to Atwater, the Court should order States to prohibit such arrests unless "necessary for enforcement of the traffic laws or when the offense would otherwise continue and pose a danger to others on the road." Atwater Br. at 46. The Texas Criminal Defense Lawyers Association advocates that arrests are unreasonable unless (1) *an officer* can articulate a valid interest in arrest apart from mere commission of a crime for which a citation could issue under state law, or (2) probable cause develops "from another source independent of the fine-only offense." Tex. Crim. Def. Laws. Ass'n Br. at 26-28. And the ACLU flatly contends that no State interest justifies arrests for fine-only traffic crimes absent "exigent circumstances." ACLU Br. at 26.

Atwater and her *amici* miss a fundamental point: An arrest "is intended to vindicate society's interest in having its laws

obeyed." *Terry v. Ohio*, 392 U.S. 1, 26 (1968). Atwater may believe that committing traffic crimes is no big deal. But the State does not forfeit its legitimate interest in obedience to the law simply because the law at issue is a misdemeanor traffic crime.

Reasonable officers might differ as to whether arresting Ms. Atwater was the ideal course of action under the circumstances presented in this case. Undoubtedly, the more common practice would be to issue a citation in lieu of arrest. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 115 n.1 (1998) (noting that "[t]he practice in Iowa of permitting citation in lieu of arrest is consistent with law reform efforts"). In fact, the Texas Department of Public Safety's training manual for new recruits explicitly encourages use of citations, instructing officers to arrest traffic offenders only when necessary "to protect the violator an[d]/or the public, an[d]/or to assure his appearance in court when such appearance is doubtful." Texas Department of Public Safety, All Field Service Recruit Training School, Patrol Procedures, T-438 "Traffic Law Enforcement Action" (1999). Specifically, Texas's manual commands that citations be used unless "by issuing a citation and releasing the violator, the safety of the public and/or the violator might be imperiled as in the case of D.W.I." *Id.* Texas teaches new recruits that citations offer many advantages, including:

"1. Court dates may be set at a time convenient for both violator and officer.

2. Time away from active patrol is kept at a minimum.

3. Court dockets can be equalized by adjusting appearance dates.

4. Convenience of violator who might be unduly delayed if custody arrest was made at that particular time.

5. Better public relations in a good number of cases."

Id.

Citations also enable officers to promote public safety by staying out on patrol rather than bringing offenders into the station for custodial processing. *See id.*; *see also* Inst. Crim. Just. Br. at 11, 15-16 & n.10. Finally, citations alleviate administrative burdens on support staff who have to complete extensive paperwork and related requirements associated with processing a custodial arrest. *See id.*, at 11-12. It is not surprising, therefore, that many model guidelines advocate use of citations in lieu of arrest for misdemeanor traffic offenses. *See* Ams. Effective L. Enforcement Br. at 8-12 (detailing ALI, ABA, and Uniform Acts standards). State *amici* support this approach and agree that in most instances issuance of a citation for a traffic offense makes the most practical sense. But this reflects a policy preference, not a constitutional rule.

Some may disapprove of Ms. Atwater's arrest, but that does not mean the Constitution prohibited it. Certainly, the Constitution does not proscribe Texas from enacting statutes that provide officers with discretion to arrest misdemeanor offenders. In fact, this Court has expressly contemplated that arrests for misdemeanor traffic offenses can and will occur. For example, in evaluating the applicability of *Miranda* to police questioning for traffic offenses, the Court stated that "we have no doubt that, in conducting most custodial interrogations of persons *arrested for misdemeanor traffic offenses*, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) (emphasis added). The Court noted that "[t]he occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare." *Id.*, at 434. But the Court did not assume that such arrests could never occur; and there was no suggestion that such arrests are unconstitutional.

Certainly, nothing in the Fourth Amendment *requires* states to compel police officers to arrest traffic offenders. As the Court stated in *Berkemer*:

> "State laws governing when a motorist detained pursuant to a traffic stop may be issued a citation instead of taken into custody vary significantly, but no State *requires* that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate." *Id.*, at 437 n.28 (emphasis added) (internal citations omitted).

See also Knowles, 525 U.S., at 115 (noting that Iowa law authorizes police officers to either arrest individuals who commit traffic offenses or follow "the far more usual practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest"); *Robinson*, 414 U.S., at 248 (Marshall, J., dissenting) ("Although, in this particular case, Officer Jenks was required by police department regulations to make an in-custody arrest rather than to issue a citation, in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer.").

Just as nothing in the Fourth Amendment compels arrests for misdemeanor traffic offenses, nor does anything in the amendment prohibit such arrests. *See New York v. Class*, 475 U.S. 106, 131 (1986) (White, J., dissenting) ("Class was unlicenced and the police were not *constitutionally* required merely to give him a citation and let his unlicenced driving continue.") (emphasis added). As Justice Stevens has observed:

> "It is, of course, true that persons apprehended for traffic violations are frequently not required to accompany the arresting officer to the police station before they are permitted to leave on their own recognizance or by using their driver's licenses as a form of bond. It is also possible that state law or local regulations may in some cases prohibit police officers from taking persons into custody for violation of minor traffic laws. *As a matter of constitutional law*, however, any person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody." *Robbins v. California*, 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) (emphasis added).

Thus, a driver who commits a misdemeanor traffic offense "could make no constitutional objection to a decision by the officer to take the driver into custody." *Id.*, at 452.

In past opinions, the Court has referenced, without criticism, state statutes that permit arrests for misdemeanor traffic offenses. *See, e.g., Knowles*, 525 U.S., at 115 (citing Iowa's statute permitting arrests for any violation of traffic or motor vehicle equipment laws); *Robinson*, 414 U.S., at 220-21 & n.1 (citing D.C. statute permitting arrests for operating a motor vehicle after revocation of a driver's permit); *Class*, 475 U.S., at 108, 118 (citing New York statute permitting arrests for traffic offenses including speeding and driving with a cracked windshield); *see also Robbins*, 453 U.S., at 450 n.12 (Stevens, J., dissenting) (referencing state laws that afford police officers "discretion to make a 'custodial arrest' for violation of any traffic law").

The Court has also discussed, again without criticism, local police department procedures that *require* an officer to summarily arrest and take into custody certain traffic offenders. *See Robinson*, 414 U.S., at 221 n.2 (describing the D.C. Metropolitan Police Department's standard operating procedures). In *Robinson*, the Court incorporated local police procedures within its rationale for refusing to explore whether a traffic-offense arrest was a mere pretext to search for drugs: "We think it is sufficient for purposes of our decision that respondent was *lawfully arrested for an offense*, and that [the officer's] placing him in custody following that arrest was *not a departure from established police department practice*." *Id.*, at 221 n.1 (emphasis added).

This analysis makes sense, because once probable cause is established it is up to state legislatures and local police de-

partments to determine whether to mandate—or for that matter, prohibit—arrests for particular categories of crimes. "[T]he Constitution does not impose on the States a rigid procedural framework." *McLaughlin*, 500 U.S., at 53. When the Fourth Amendment is at issue, "individual States may choose to comply in different ways." *Id.*; *Gerstein*, 420 U.S., at 113-14 (recognizing "the desirability of flexibility and experimentation by the States" with respect to criminal procedure laws); *see also Ker v. California*, 374 U.S. 23, 34 (1963).

It is up to the States to develop procedures for processing criminal offenders, provided those procedures are consistent with the Fourth Amendment. *See Sibron*, 392 U.S., at 60-61. If an individual violates the law, arresting him will not offend the Constitution unless the arrest is processed in an unreasonable manner. *See Whren*, 517 U.S., at 818. Because Ms. Atwater was not processed in a unreasonable manner, no violation of her Fourth Amendment rights occurred.

II. THE COURT HAS CONSISTENTLY REJECTED CATEGORICAL LINE-DRAWING UNDER THE FOURTH AMENDMENT AND SHOULD DO SO IN THIS CASE AS WELL.

The Court has previously declined to compartmentalize the Fourth Amendment into predefined categories of permissible police conduct. *See, e.g., Robinson*, 414 U.S., at 234-35 (refusing to limit the search-incident-to-arrest rule in the context of an arrest for driving with a revoked license, and concluding that Fourth Amendment principles advocate for "treating all custodial arrests alike for purposes of search justification"); *Warden v. Hayden*, 387 U.S. 294, 300-01 (1967) (refusing to create Fourth Amendment categories of seizable and nonseizable types of evidence); *cf. Berkemer*, 468 U.S., at 429 (refusing "to carve an exception out of" *Miranda* in the

context of custodial interrogation for misdemeanor traffic offenses).[5]

In *Hayden*, the Court rejected the notion that stricter constitutional rules were required for seizures of certain types of personal property possessed by a suspect—namely, "mere evidence" of a crime as opposed to the fruits or instrumentalities of a crime. 387 U.S., at 300-01. Instead, general Fourth Amendment principles would determine the reasonableness of all evidentiary seizures. *See id.*, at 309-10 ("[T]here is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband.").[6]

In declining to engage in categorical line-drawing, the Court cited the plain text of the Constitution: "Nothing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of crime, or contraband." *Id.*, at 301. Similarly, nothing in the plain language of the amendment supports a distinction between permissible seizures (*i.e.*, arrests) based on the

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[5] While the *Miranda* protections are rooted in the Fifth Amendment's prohibition against self-incrimination, *Berkemer* centered on the obligations of police to give *Miranda* warnings during custodial arrests for misdemeanor traffic violations, which are "seizures" governed by the Fourth Amendment. The Court declined to define different constitutional rules for subcategories of arrests depending on "the nature or severity of the offense for which [the arrestee] is suspected or for which he was arrested." 468 U.S., at 434.

[6] Similarly, *Berkemer* held that "a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." 468 U.S., at 434. If custodial interrogations for misdemeanor traffic offenses were excepted from the general rule, "the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development." *Id.*, at 432.

category of criminal offense. The Fourth Amendment prohibits unreasonable seizures—not seizures for misdemeanors as opposed to felonies, much less fine-only traffic misdemeanors as opposed to all other crimes.

A. The Common Law Does Not Require the Court to Devise Fourth Amendment Subcategories of Permissible Arrests.

The Court has rejected the notion that the Fourth Amendment only allows searches and seizures that were permitted at common law. In *Hayden*, for example, the Court declined to adopt common law categories of seizable property as Fourth Amendment requirements. Recognizing that the "the common law of search and seizure" permitted seizure of contraband and fruits of a crime, but not of evidence to help apprehend and convict criminals, the Court determined that these common law distinctions were "based on premises no longer accepted as rules governing the application of the Fourth Amendment." *Id.*, at 300-01, 303. *Hayden* overruled a prior case that had tracked common law reasoning and erroneously concluded "that the *Constitution* virtually limited searches and seizures to these categories." *Id.*, at 308 (citing *Gouled v. United States*, 255 U.S. 298 (1921)) (emphasis added). As *Hayden* made clear, no *constitutional* search-and-seizure subcategories exist. Rather, "[t]he requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband." *Id.*, at 307.

Similarly, the Fourth Amendment does not compel constitutionalization of the limited, common law arrest categories Atwater advocates. First, as evidenced by *Hayden*, common law search-and-seizure categories are not dispositive of Fourth Amendment protections. *See* 387 U.S., at 300-01, 303-04; *see also California v. Hodari D.*, 499 U.S. 621, 626 n.2 (1991) ("The common law may have made an attempted

seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions."); *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J., dissenting) (observing that the common law "requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment, and we have never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence") (citations omitted). Contrary to Atwater's suggestions, "this Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton*, 445 U.S., at 591 & n.33.

Second, even assuming the common law rule applied, it would not mandate judgment in Atwater's favor. Atwater's common law argument is predicated solely on the meaning of "breach of the peace"—a term to which varying definitions have been ascribed, as she herself acknowledges. *See* Atwater Br. at 16-17; *see also* Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 229 (1940) (noting "some disagreement" over common law authority to arrest for offenses committed in an officer's presence but that do not cause public disorder). To the extent "breach of the peace" meant a violation of law, as opposed to a public disturbance, an arrest for *any* misdemeanor criminal offense committed in an officer's presence would be permissible under the common law. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 538-40 (1997) (Scalia, J., concurring) (noting that in the period leading up to ratification of the Bill of Rights "keeping 'peace' and 'order' seems to have meant, precisely, obeying the laws. '[E]very breach of the law is against the peace.'") (citing *Queen v. Lane*, 87 Eng. Rep. 884, 885 (Q.B. 1704)); *cf. United States v. Brewster*, 408 U.S. 501, 521 (1972) (noting, in construing the Speech or Debate Clause, that "when the Constitution was written the term 'breach of the peace' did not mean, as it came to mean later, a misdemeanor such as

disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law").

Furthermore, this Court has frequently stated the common law rule for misdemeanor arrests without specific reference to any breach-of-the-peace requirement—emphasizing, instead, that a misdemeanor must have been committed in an officer's presence to justify a common law arrest. *See, e.g., United States v. Watson*, 423 U.S. 411, 418 (1976) ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."); *John Bad Elk v. United States*, 177 U.S. 529, 534 (1900) ("So, an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); *Kurtz v. Moffitt*, 115 U.S. 487, 498-99 (1885) ("By the common law of England, neither a civil officer nor a private citizen had the right, without a warrant, to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."); *cf. Carroll v. United States*, 267 U.S. 132, 156 (1925) (stating, as the common law "usual rule," that an officer "may only arrest without a warrant one guilty of a misdemeanor if committed in his presence," but noting that the rule "is sometimes expressed" in terms of "a breach of the peace . . . committed in his presence"). Ms. Atwater does not dispute that she committed a misdemeanor offense in the arresting officer's presence. This suffices under the "usual" common law rule articulated by the Court, and it certainly satisfies the demands of the Fourth Amendment.

Finally, and most importantly, Atwater fails to recognize that a state, by statute, may authorize arrests that would not

have been permissible at common law. "[I]t is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states." *See Welsh*, 466 U.S., at 756 (White, J., dissenting) (quotation marks omitted); *see also Carroll*, 267 U.S., at 164, 166-67 (McReynolds, J., dissenting) (noting that statutes can abrogate common law restrictions on misdemeanor arrests and listing examples where Congress has expressly done so); *John Bad Elk*, 177 U.S., at 535 (looking to South Dakota law to determine whether the common law arrest rule had been expanded by statute); *see also* 10 HALSBURY'S LAWS OF ENGLAND §§632, 639-642, at 342, 346-51 (3d ed. 1955); Perkins, *supra*, 25 IOWA L. REV., at 230.

Atwater glosses past the well-established principle that "[a]n arrest without a warrant may be under a power conferred by common law *or by statute*." 10 HALSBURY'S LAWS OF ENGLAND §632, at 342 (emphasis added). She mischaracterizes legislation expanding common law arrest rules as something that occurred only before the Fourth Amendment applied to the states. *See* Atwater Br. at 18 (citing *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)). To the contrary, there has been consistent, post-*Wolf* recognition of state search-and-seizure powers beyond those permitted at common law. *See, e.g., Hodari*, 499 U.S., at 626 n.2; *Welsh*, 466 U.S., at 756 (White, J., dissenting). Moreover, this Court has repeatedly acknowledged, without apparent alarm, the existence of state statutes that authorize the type of traffic arrests Atwater contends the common law would prohibit. *See supra* Part I.C. Contrary to Atwater's suggestion, common law arrest rules simply do not control the Fourth Amendment analysis in this case.

B. Arrests for Misdemeanor Traffic Offenses Are Not Akin to "General Warrants."

There is no merit to Atwater's argument that permitting fine-only misdemeanor arrests affords officers boundless search-and-seizure discretion reminiscent of British "general warrants," which the House of Commons declared illegal in 1766 and the Framers rejected when they enacted the Fourth Amendment. *See Henry*, 361 U.S., at 100-01 & n.1; *Hayden*, 387 U.S. at 301; *see also Boyd v. United States*, 116 U.S. 616, 624-26 (1886). General warrants provided open-ended authority for British officers "to arrest and search on suspicion," without any requirement that probable cause exist. *Henry*, 361 U.S., at 100. The Secretary of State primarily issued general warrants to search homes for private papers and books, hoping to uncover writings that could be used to convict their owner of "heinously libelous" denunciation of the government. *Boyd*, 116 U.S., at 625-26.

Permitting arrests for misdemeanor traffic offenses is not remotely comparable to issuance of general warrants. In fact, "[t]here is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Watson*, 423 U.S., at 429 (Powell, J., concurring).

The distinctions between general warrants and on-the-spot arrests for traffic offenses are obvious. First and foremost, such arrests do not entail intrusions upon the sanctity of one's home. "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh*, 466 U.S., at 748 (quoting *United States v. United States Dist. Court*, 407 U.S. 297

(1972)).[7] A home intrusion raises Fourth Amendment concerns distinct from those present in a public arrest immediately following commission of a traffic crime. *Compare Welsh*, 466 U.S., at 750 ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."), *with Class*, 475 U.S., at 113 ("Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.") (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

Second, police officers' discretion to arrest traffic offenders is not boundless. Rather, it is squarely circumscribed by the state statute that defines the offense on which the arrest must be based. Officers cannot make up crimes. Moreover,

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[7] The Institute of Criminal Justice *amici* discuss *Welsh* as though it were an opinion focused on the minor nature of traffic offenses rather than the constitutional requirement that exigent circumstances justify warrantless entry of a home. *See* Instit. Crim. Just. Br. at 18-20. True, *Welsh* did involve an arrest for a non-jailable *civil* traffic offense, and the Court did note that the State of Wisconsin's classification of the offense signaled a lesser state interest in arresting the offender. 466 U.S., at 754 & n.14. However, the issue before the Court was not the permissibility of a routine public arrest, but whether there were exigent circumstances to justify a *warrantless intrusion into the offender's home* for purposes of making the arrest therein. Given this inquiry, the Court concluded that "the special protection afforded the individual in his home by the Fourth Amendment" prohibited a warrantless entry of the offender's home and intrusion into "the privacy of his bedroom for a noncriminal, traffic offense." *Id.*, at 753-54.

Atwater was not arrested pursuant to a warrantless entry of her home. Moreover, the Texas traffic law at issue, unlike the Wisconsin statute considered in *Welsh*, creates a *criminal* offense, albeit a non-jailable misdemeanor. *Welsh* offers no insight into the distinct constitutional question presented here: whether an officer can effect a routine, public arrest of a *criminal* offender when the crime happens to be traffic offense.

they cannot arrest on the type of "mere suspicion" that sufficed for purposes of general warrants. *Henry*, 361 U.S., at 101. Instead, the officer must have probable cause to believe that an individual has committed an actual crime as defined by law. *See id.*, at 102.

Atwater may disagree with the Texas Legislature's decision to criminalize certain traffic offenses. If so, she can lobby for a change in the law. *Cf. Welsh*, 466 U.S., at 754 (noting that "[t]he State of Wisconsin has *chosen* to classify the first offense for driving while intoxicated as a *noncriminal, civil forfeiture offense* for which no imprisonment is possible") (emphasis added). But Atwater cannot contend that her arrest for an undisputed criminal violation of Texas law was unconstitutional, *per se*, simply because her crime was a misdemeanor, fine-only traffic offense. The Fourth Amendment does not curtail states' discretion to criminalize certain forms of conduct or to impose varying penalties for state-defined crimes. *See Welsh*, 466 U.S., at 755-56 (Blackmun, J, concurring) (criticizing Wisconsin's fine-only penalties for first-offender drunk drivers but noting that "if Wisconsin and other States choose by legislation thus to regulate their penalty structure, there is, unfortunately, nothing in the United States Constitution that says they may not do so").

Ms. Atwater committed a crime under Texas law. A police officer saw her commit that violation, and she was arrested. This was an embarrassing event in her life, but embarrassment does not translate into constitutional injury. Because Ms. Atwater committed a crime, the existence of probable cause ends the constitutional inquiry, and it insulates the arresting officer from liability. *See Whren*, 517 U.S., at 818-19; *Robinson*, 414 U.S., at 235; *Henry*, 361 U.S., at 102.[8]

[8] Even if the Court were to announce special arrest standards for fine-only traffic crimes under which Ms. Atwater's arrest is deemed unconstitutional, Officer Turek, who made the arrest, would not be liable. On March 26, 1997, it was not clearly established that the Fourth Amendment

prohibits arrests for undisputed misdemeanor traffic offenses, and he is therefore entitled to qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 609, 614 (1999). Indeed, far from indicating a constitutional problem, existing law suggested that Atwater's arrest was lawful. The Fifth Circuit—to which a reasonable Texas peace officer would look for guidance—had expressly held that a warrantless misdemeanor arrest, if supported by probable cause, does not violate the Fourth Amendment. *See Fields v. City of S. Houston*, 922 F.2d 1183, 1189 (CA5 1991) (relying on *Street v. Surdyka*, 492 F.2d 368, 372-73 (CA4 1974)). Thus, under controlling precedent in Officer Turek's jurisdiction, a reasonable officer could believe that arresting Ms. Atwater was constitutional. *See Wilson*, 526 U.S., at 617. Moreover, the consistent signal from this Court had been that arrests for misdemeanor traffic violations would not violate the Fourth Amendment if supported by probable cause. *See, e.g., Robinson*, 414 U.S., at 221 n.1, 235; *see generally supra* Part I.C (discussing cases). Under these circumstances, qualified immunity applies.

Furthermore, at the time of arrest, other circuit authority confirmed that misdemeanor traffic arrests need only be supported by probable cause. *See Barry v. Fowler*, 902 F.2d 770 (CA9 1990) (holding that probable cause justified an arrest for the misdemeanor of vehicle tampering, where a daughter asked a friend to paste a "no trespassing" sign on the windshield of a car parked illegally on her parents' property). And, in general, the consensus among the circuits was that arrests for misdemeanor, fine-only, or local petty offenses were permissible whenever supported by probable cause. *See, e.g., Pyles v. Raisor*, 60 F.3d 1211, 1215 (CA6 1995) (holding that arrest for misdemeanor offense of providing a sip of beer to a seventeen-year-old at a rock concert did not violate the Fourth Amendment because it was supported by probable cause); *Higbee v. City of San Diego*, 911 F.2d 377, 379-80 (CA9 1990) (holding that arrest for violation of a "peep show" local ordinance did not violate the Fourth Amendment, even though officers had discretion under California law to issue a citation in lieu of arrest); *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1137, 1139 & n.6 (CA4 1982) (holding that arrest based on probable cause for fine-only offense of eating on a train did not violate Fourth Amendment constitutional standards, even though it may not have been authorized by Virginia's criminal procedure statutes). Although decided two months after Ms. Atwater's arrest, the Seventh Circuit's decision in *Ricci v. Arlington Heights* bears mention because it confirms the circuits' consistency on this issue. 116 F.3d 288, 292 (CA7 1997) (holding that an arrest and one-hour detention for processing paperwork did not violate the Fourth Amendment where there was probable

III. THIS CASE DOES NOT PRESENT THE ISSUES OF RACIAL PROFILING OR PRETEXTUAL ARRESTS TO CONDUCT WARRANTLESS CAR SEARCHES.

Atwater and her supporting *amici* set forth a parade of horribles they fear will ensue if arrests for misdemeanor traffic violations are not prohibited. In particular, they fear that these arrests will lead to racial profiling—*i.e.*, targeting of minority traffic offenders whom officers may be more likely to associate with drug activity. In addition, Atwater and her *amici* proclaim that permitting arrests for traffic offenses will eviscerate the limitations on traffic-related searches this Court implemented in *Knowles v. Iowa*. Neither allegation has bearing on this case for two reasons. First, Atwater has not alleged that she was unconstitutionally searched on racial or otherwise pretextual grounds. These issues, therefore, are not presented in this case. Second, a pretextual search does not violate the Fourth Amendment if it occurs incident to an arrest that is supported by probable cause.

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cause to believe arrestee violated a local ordinance creating the civil, fine-only offense of operating a business without a license), *cert. granted*, 522 U.S. 1038, *and cert. dismissed as improvidently granted*, 523 U.S. 613 (1998); *see also Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (CA1 1997) (holding that the only Fourth Amendment right implicated by a misdemeanor arrest for drunk driving was the right not to be arrested without probable cause).

Given that there was (1) controlling federal precedent in Officer Turek's jurisdiction, (2) "a consensus of cases of persuasive authority in other circuits," and (3) strong signals from the Court that misdemeanor traffic-offense arrests are lawful if supported by probable cause, a reasonable officer in Officer Turek's position could have believed that arresting Ms. Atwater would not offend the Constitution. *Wilson*, 526 U.S., at 617. As such, Officer Turek is entitled to qualified immunity even if the Court determines that he violated Ms. Atwater's Fourth Amendment rights. *Id.*, at 614, 617.

A. Racial Profiling Is Governed by the Equal Protection Clause of the Fourteenth Amendment, Not the Fourth Amendment's Proscription Against Unreasonable Searches and Seizures.

The State *amici* condemn racial profiling and firmly agree that "the Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren*, 517 U.S., at 813. However, the Court has made clear that the proper constitutional basis for raising claims of selective traffic enforcement is the Equal Protection Clause of the Fourteenth Amendment, not the Fourth Amendment. *Id.*, at 813. The type of subjective intent at issue in racial profiling has no place in Fourth Amendment "reasonableness" analysis—which entails an objective inquiry centered on probable cause. *See id.*, at 814-16.

Thus, even assuming there were allegations of facially selective traffic enforcement at issue in this case—which there are not—there would be no impact on the reasonableness of Ms. Atwater's arrest. Because the arrest was supported by probable cause, no violation of Ms. Atwater's Fourth Amendment rights occurred.

Moreover, the fact that no racial profiling occurred in this case makes it an inappropriate vehicle for exploring this complex issue. *See Robinson*, 414 U.S., at 221 n.1 (dismissing allegations of a pretextual arrest-related search that was incident to a lawful traffic arrest effected pursuant to police department procedures, and "leav[ing] for another day questions which would arise on facts different from these"); *cf. Berkemer*, 468 U.S., at 434 n.21 (deferring, to a more factually appropriate case, consideration of *Miranda*-related questions not necessary to resolve the actual issue before the Court).

B. Permitting Arrests for Traffic Offenses Does Not Conflict with *Knowles v. Iowa.*

Atwater and several *amici* proclaim that arrests for traffic violations create carte blanche for officers to search traffic offenders in a manner that conflicts with *Knowles v. Iowa*. No such conflict exists.

Knowles addressed the constitutionality of a search in connection with a traffic offense for which the driver was cited but not actually arrested—in other words, "a search incident to citation." 525 U.S., at 115. In analyzing the constitutionality of the search, the Court noted that Iowa law permitted officers to either arrest or issue citations to traffic offenders. *See id.* In addition, a subdivision of the Iowa citation statue permitted officers to conduct a search even if they chose not to make an arrest. *See id.*

The Court concluded that although the "search incident to citation" was authorized under state law, it violated the Fourth Amendment. When an officer exercises his discretion under Iowa law to issue a citation rather than effect an arrest, he cannot then search incident to the citation. *See id.*, at 117-18. This is because the safety concerns and other rationales underlying a search incident to custodial arrest are not present when an officer merely issues a citation. *Id.*, at 117. The fact of arrest, and not the "grounds for arrest," determines the permissibility of the search. *Id.*

Nothing about an arrest for a misdemeanor traffic offense conflicts with *Knowles*. *Knowles* did not suggest that arrests for such offenses are prohibited by the Fourth Amendment. To the contrary, *Knowles* indicated that arrests were necessary in order to justify searches in connection with traffic violations. *Id.*

The Court's unanimous decision in *Whren* demonstrates that even a pretextual traffic arrest does not offend the Fourth Amendment if the arresting officer has probable cause to believe a traffic offense has been committed. 517 U.S., at 811-13 (dispelling notions that "ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law occurred"); *see also Robbins*, 453 U.S., at 452 (Stevens, J., dissenting) (stating that a driver arrested for a traffic offense cannot make any "constitutional objection" to being taken into custody as justification for a search of the entire interior of the vehicle); *cf. Graham*, 490 U.S., at 397 (noting, within the context of an excessive force claim, that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force"). Put succinctly, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Whren*, 716 U.S., at 814.

Although *Whren* involved an allegedly pretextual stop, as opposed to a pretextual arrest, its reasoning applies equally in the arrest context. *See id.*, at 811-14 (citing *Robinson*, 414 U.S., at 221 n.1, for the proposition that a lawful traffic-violation arrest "would not be rendered invalid by the fact that it was 'a mere pretext to search for narcotics'"). If anything, there should be fewer concerns about pretextual arrests, because an arrest requires more police accountability than a stop. A patrolling officer can freely stop individuals for traffic offenses, and if the officer opts not to arrest or cite the offender, there is likely to be no formal documentation of the incident. By contrast, an officer who opts to make a custodial arrest must take the offender in for processing, and the officer must complete and sign supporting documentation. It is far less likely that officers will commit arrest abuses, because they are so readily traceable.

Even some of Atwater's supporting *amici* acknowledge that the documentation procedures associated with an arrest would make an officer's abuse of arrest discretion detectable and redressable by the officer's police chief. *See* Inst. Crim.

Just. Br. 15-17 & n.11. But these *amici* simply do not trust police departments to keep their officers in line. *See id.*, at 16 n.11; *cf.* Nat'l Ass'n Crim. Def. Laws. Br. at 3, 11-12; ACLU Br. at 8.

Because Atwater and her supporting *amici* expect police to abuse their authority to search incident to arrest, they ask this Court to make a preemptive strike by prohibiting arrests for "common" crimes such as traffic offenses. But anticipatory fear of hypothetical abuses is not a legitimate basis to categorically circumscribe officer discretion and strip states of their traditional sovereign authority to regulate the processing of criminal offenders within their borders. Nor is it grounds to constitutionalize a hierarchy of offenses, with only some worthy of enforcement through arrest. The Court already unanimously rejected a similar argument in *Whren*. 517 U.S., at 818-19.

If concerns exist that pretextual arrests will be used to justify vehicle searches, those concerns should be addressed in a case that actually presents the issue. Ms. Atwater does not challenge any search incident to her arrest. Nor does she allege that she was pretextually arrested for the purpose of searching her vehicle. The Court should decline to speculate about hypothetical police abuses that are not at issue in this case. *Cf. Robinson*, 414 U.S., at 221 n.1; *Berkemer*, 468 U.S., at 434 n.21.

CONCLUSION

For these reasons, *amici* respectfully request that the Court affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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